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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1112

TANNER MOTOR TOURS, LTD. (a California Corporation), TANNER MOTOR TOURS OF NEVADA, LTD. (a Nevada Corporation), TANNER MOTOR TOURS CORPORATION, LIMITED a Nevada Corporation), TANNER MOTOR TOURS LTD. (a Nevada Corporation), TANNER MOTOR TOURS LTD. OF CALIFORNIA (a California Corporation) and LUCKY CAB Co. (a Nevada Corporation),

Petitioners,

—against—

NETTIE GELFAND and PHILLIP GELFAND,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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February 7, 1968

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NETTIE GELFAND and PHILLIP GELFAND,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit in the above-entitled case. The opinion and judgment of the Court of Appeals were entered on November 13, 1967.

Opinions Below

Initially, the United States District Court for the Eastern District of New York, Dooling, *J.*, in an Opinion and Order dated January 31, 1964, dismissed the action for lack of jurisdiction. Thereafter, the Court of Appeals for the

Second Circuit reversed this determination and remanded the matter for further proceedings on the jurisdictional facts, 339 F. 2d 317 (1964). After further hearings were held, including extensive discovery proceedings, Judge Dooling again dismissed the action on the facts before him in an Opinion and Order dated December 27, 1966. Subsequently, the Court of Appeals, in an Opinion and Judgment dated November 13, 1967, reversed this second finding of Judge Dooling and held that there was jurisdiction. It is from this second judgment of the Court of Appeals that certiorari is here sought. All of the aforesaid Opinions are printed as an Appendix to this Petition. A motion of the petitioners addressed to the Court of Appeals for a rehearing and rehearing *in banc* was denied by Order dated December 8, 1967.

Jurisdiction

Jurisdiction of this Court is invoked under the Constitution of the United States, Amendments V and XIV (§1).

Questions for Review

1. The Court of Appeals determined that New York has jurisdiction over the defendants in a case growing out of a bus accident which allegedly occurred in the State of Arizona. The defendants' only contact with New York was through a public relations counsellor who was under contract to a trade association of which they were members. He had no such contract with the defendants. Does this determination constitute a deprivation of due process under the fifth and fourteenth amendments of the United States Constitution?

2. In making the aforesaid determination, the Court of Appeals was construing §301 of the New York Civil Practice Law and Rules, a so-called "long-arm" statute. Would the extension of this statute to encompass the case at bar constitute a deprivation of the defendants' right to due process under the fifth and fourteenth amendments of the United States Constitution?

3. Is the aforesaid determination of the Court of Appeals for the Second Circuit in conflict with the determination of the Court of Appeals for the Fifth Circuit in *Turner* v. *Jack Tar Grand Bahama, Ltd.*, 353 F. 2d 954, decided in 1965?

Pertinent Constitutional and Statutory Provisions

1. United States Constitution, Amendment 5:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. United States Constitution, Amendment 14, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. The Statute involved in this case is §301 of the Civil Practice Law and Rules of the State of New York, which provides:

"Jurisdiction over persons, property or status. A court may exercise such jurisdiction over persons, property or status as might have been exercised heretofore." Chapter 308, Article 3; Section 301 of Laws of New York, 1962. Effective April 4, 1962.

Statement of the Case

This is a negligence action to recover for personal injuries that allegedly occurred when a wheel allegedly fell off a bus on a highway in Arizona. Plaintiffs, alleging that they were passengers in the bus and that the defendants carelessly operated the bus, brought suit not in Arizona, but in the United States District Court for the Eastern District of New York, where they reside.

The basis for Federal jurisdiction in the first instance was diversity of citizenship and that the matter in controversy exceeded $10,000.

None of the defendants—all western corporations—have offices or employees in New York, none are listed in New

York telephone or building directories, nor are they qualified to do business in New York (R. 170a).*

Plaintiffs' basis for stretching New York's jurisdiction, and applying New York's standards of liability and damages to this western state accident, rests upon a "contact" of defendants in New York that is so minimal as to violate due process under the national Constitution.

In the hearings below it was found that the defendants belonged to a trade association named "Gray Line Associated" whose function it was to conduct advertising and public relations campaigns for some 90 bus companies, including defendants, who were members of the trade association (R. 171a-173a). Gray Line Associated itself was not a New York corporation, but was chartered in Maryland and had its principal place of business in Chicago, Illinois (R. 172a-173a). Gray Line Associated neither owned nor operated any busses (R. 171a).

It is clear from all the proceedings below that plaintiffs seek to find defendant bus companies amenable to New York jurisdiction because of a finding that their trade association, Gray Line Associated, is subject to such jurisdiction.

Gray Line Associated's "contact" with New York was through a contractual relationship with Herbert DeGraff Inc., operated by one Herbert DeGraff. DeGraff Inc. was a corporation, with offices on Madison Avenue, New York City, which provided public relations and other services for over 200 hotels and four airlines, in addition to Gray Line Associated, which was but one of its clients (R. 174a).

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* "R" refers to the Appendix before the Court below, a certified copy of which has been filed with this Court.

DeGraff Inc.'s contract with Gray Line Associated (R. 173a-174a) provided that he was retained for $23,500. per year as an independent contractor to represent Gray Line Associated and all of its members, solicit business for them and arrange for package sightseeing tours.

DeGraff Inc. handled matters for some fifteen or twenty clients, one of which is Gray Line Associated (R. 148a). The most important part of DeGraff's work for Gray Line Associated "is from the sales standpoint of calling upon the major travel agents and the major transportation carriers. That's where the majority of our time is spent" (R. 130a). His salesmen try to sell the services of all of his clients at the same time (R. 131a). He attempts to create business any way he can (R. 93a).

Another service furnished by DeGraff to his clients was a so-called "reservation service". It was this reservation service, as applied to a Grand Canyon tour, that the Court of Appeals relied on for its finding of jurisdiction.

DeGraff employed approximately six reservation clerks, who took reservations simultaneously for many of his clients (R. 146a). The District Court, as trier of the facts, found that neither DeGraff nor Gray Line Associated was primarily engaged in selling transportation. That function was performed by independent travel agents who issued coupons, collected the price, retained a commission and forwarded the balance to carriers, such as the defendants (R. 176a). All of the members of Gray Line Associated represented that they would have a bus available even if it was only for one passenger (R. 84a). For that reason, in 95% of the cases where travel agents were arranging tours on Gray Line busses, no resort was had to DeGraff's office. However, on some tours, elements are involved other than

just a Gray Line bus (R. 132a). For example, the tour of the Grand Canyon was an overnight trip, requiring a stay at the Grand Canyon Hotel. Obviously, the number of rooms available at this Hotel is limited. Since neither passengers nor their travel agents like to travel at their peril, they would like to know in advance that when they get to the Grand Canyon they will not only be able to get on a Gray Line bus, but they will be able to stay at the Hotel. For that reason, DeGraff was kept advised by wire when rooms at the Hotel were sold out (R. 69a). A travel agent may, if he wishes, in connection with this tour, communicate directly with the carrier and the hotel without ever consulting DeGraff. This was the course that was followed by the travel agent employed by the plaintiffs in this case (R. 132a). He may, on the other hand, 'phone DeGraff's office and inquire as to whether rooms are still available for the date with which he is concerned (R. 132a). Having received a "Yes" answer he may then, if he wishes, communicate directly with the carrier and the hotel. On the other hand, he may ask DeGraff to fill out for him a reservation form. The travel agent then issues his own coupon and follows the normal procedure (R. 132a).

The aforesaid service furnished by DeGraff was simply a convenience to travel agents and their customers (R. 133a). DeGraff could do no more to commit anyone than could a travel agent (R. 133a): When a passenger arrived at the point of embarkation he would always be able to get on a bus, but when he arrived at the Grand Canyon, either with or without a reservation, whether issued by the travel agent or by DeGraff, and found that there were no rooms left at the hotel, there would be nothing much anyone can do about it.

Since, as noted above, both travel agents and their customers would like some reasonable assurance of the availability of hotel rooms, in approximately three-sevenths of the cases (R. 175a) in which travel agents had arranged Grand Canyon tours they utilized the services of DeGraff's office. Obviously, the existence of this service was good for sales (R. 150a) of Gray Line tours, hotel rooms and the business of all those engaged in any trade or occupation at the Grand Canyon.

DeGraff received no compensation from the defendants (R. 136a), received no directives from them and submitted no reports to them (R. 125a).

The District Court found that:

> "The activity of DeGraff Inc. in acting as a central reservation office through which travel agents can make or confirm reservations is an alternative to the usually slower and more inconvenient method of having the travel agent communicate directly with the bus line or hotel offering the desired travel service" (R. 177a).
>
> * * * * *
>
> "There is no evidence that and it is not found that Gray Line Associated or DeGraff Inc. or Herbert J. DeGraff was expected or required to or did act under the direction or control of defendants as would an agent or servant." (R. 177a).
>
> * * * * *
>
> "The Gray Line Associated-DeGraff Inc. activity here presented is too generalized, collateral and indirect. Its characterizing elements are that it is neither directly controlled by defendants, nor is it integral to defendants' transactions of sale, nor is it particular to

> defendants, but it is an independently constituted set of activities, related primarily to overall sales promotion, and general to the ninety Gray Line companies, and, in the case of DeGraff Inc. activity, to many hotels and a certain number of other carriers. No doubt the case presents, as do all cases of this class, the evident fact that through these means defendants promote the marketing in New York to New Yorkers of a service that is rendered elsewhere. But that is not enough . . . " (R. 181a).

The Court of Appeals, however, reversed, holding that the defendants' reliance on DeGraff for three-sevenths of its business on the Grand Canyon tour was sufficient contact with New York.

Reasons for Granting Writ

This case presents a fundamental issue of jurisdiction which should be reviewed by this Court. The far-reaching decision of the Court of Appeals below would open the jurisdictional doors of States with minute contacts—if that—to disputes arising wholly outside their boundaries, and allow such States to determine such disputes with finality.

In times like the present, with travel of thousands of miles across the Nation accomplished in hours and with electronic systems of communications making contacts among citizens instantaneous, the question becomes whether the use of any part of such system nullifies the concept of proper primacy of individual States and of their courts. The decision below grants full jurisdiction to a State—New York—to apply its own standards and fix liability on

non-residents arising from an accident occurring far from its borders, even though the defendant had virtually no contact with New York. Federal due process, it is submitted, is violated by such a result.

Minimal contacts with a State asserting jurisdiction are sufficient if the standards of "fair play and substantial justice", as enunciated in *International Shoe Co. v. State of Washington,* 326 U. S. 310 (1945) are met. The Court of Appeals, in reversing the District Court below, stretches these boundaries far enough to create a precedent for upholding jurisdiction over increasingly common situations where business corporations of necessity have some contact in all States of the Union.

In *International Shoe, supra,* at page 319, this Court set forth the following standard to be followed in determining whether "fair play and substantial justice" have been accorded:

> "It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. . . . Whether due process is satisfied must depend rather on the *quality and nature of the activity.* . . . " (Emphasis added.)

In applying this decision in *Miller* v. *Surf Properties,* 4 N. Y. 2d 475, 481, the New York Court of Appeals stated that the quality and nature of the activity required to find jurisdiction must be such as to call for the exercise of *judgment* and *discretion.*

What were the nature and quality of the local activities in this case?

The Court of Appeals focusses on the "reservations service" furnished by DeGraff in order to find jurisdiction in New York. An analysis of this reservations service shows (1) it was maintained for the convenience of travel agents and their customers and was therefore merely an exercise in salesmanship; (2) it was maintained to advise travel agents of the availability of hotel rooms, not busses. The defendants had no interest in the hotel involved; and (3) the service was purely mechanical and clerical, calling for no exercise of judgment or discretion and could have been performed by a computer. Under the rationale of the Court below jurisdiction would be conferred on any State in which the computer was plugged in. The holding of the Court below would also mean that the Grand Canyon Hotel, all vendors at the Grand Canyon and all of DeGraff's clients are doing business in New York, since they all benefit from his services. It is submitted that such a conclusion is unfair to the defendants as well as to the already overcrowded Courts of New York.

Clearly, plaintiffs were wronged, if anywhere, in the west, where defendants were actually doing business. Plaintiffs could have sued defendants in Nevada, and did in fact do so (R. 151a). They presently have an action pending in the local courts of that State and are holding it in abeyance pending the determination of the instant action. Plaintiffs are obviously hoping for a potentially higher New York verdict than they would expect in their Nevada case. See dissenting opinion of Breitel, *J.*, in *Frummer* v. *Hilton Hotels International, Inc.*, 19 N. Y. 2d 533 (1967). Is it "fair play and substantial justice" to inflict on defendants

this New York case when the defendants are fundamentally strangers to New York, where there is an obviously proper forum in Nevada and where that forum has already been resorted to by the plaintiffs?

In finding that DeGraff's activity was sufficient to confer jurisdiction, the Court below relied heavily upon a New York decision, by a closely divided Court, *Frummer* v. *Hilton Hotels International, Inc., supra.* However, in the *Frummer* case there was a factual determination that local services were rendered by an agent of the foreign corporation. In the instant case there was no such finding, either by the District Court or the Court of Appeals.

The Court of Appeals for the Fifth Circuit has rendered a judgment which, it is submitted, is in conflict with the opinion of the Court below. *Turner* v. *Jack Tar Grand Bahamas, Ltd.,* 353 F. 2d 954 (5th Cir. 1965). In *Turner* the Court upheld the dismissal for lack of jurisdiction of a complaint for injuries sustained in a hotel in the Bahamas. The fact that transportation and reservation services for the Bahamas hotel were conducted by a corporation located and doing business in Texas was held by the Circuit Court to be "too remotely related to appellee's 'business' to provide a basis for *in personam* jurisdiction." The Court held that however broad the intended scope of the Texas "long-arm" statute, it could not constitutionally be construed by the Texas Courts so as to rest jurisdiction in Texas.

The reasoning of the Court below in the instant case was that these non-resident defendants were suable in New York because they used an independent contractor—DeGraff—who provided some service to them and to hundreds of others from an office in New York. This is going too far. Such a widespread ruling as that of the Court below, with all of the implications referred to above, should at least be reviewed by this Court for a determinative ruling.

CONCLUSION

The Writ of Certiorari should issue.

Respectfully submitted,

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February 7, 1968

APPENDIX

First Opinion of Judge Dooling, January 31, 1964

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

63 C 1281

NETTIE GELFAND and PHILIP GELFAND,

Plaintiffs,

—against—

TANNER MOTOR TOURS, LTD. (a California Corporation), TANNER MOTOR TOURS OF NEVADA, LTD. (a Nevada Corporation), TANNER MOTOR TOURS CORPORATION, LIMITED (a Nevada Corporation), TANNER MOTOR TOURS, LTD. (a Nevada Corporation), TANNER MOTOR TOURS LTD. OF CALIFORNIA (a California Corporation) and LUCKY CAB CO. (a Nevada Corporation),

Defendants.

MEMORANDUM AND ORDER

The summons and complaint have been served on each defendant by delivering a copy to its supposed managing agent here and by delivering another copy to a proper person at the defendants' domicile in California or Nevada. Defendants have moved to quash on juridisdictional grounds.

While defendants' affidavits are most unimpressive and are hardly very frank, and the existence of "Gray Line Sightseeing Companies, Associated," invites allusions to

estoppels-to-deny, what, finally, emerges is the bare, familiar picture of a carrier which performs all its carrier service far from New York and solicits business here through independent travel "agents" or consolidated ticket "agents." The accident out of which the claims arise happened in Arizona.

Not enough is shown to establish jurisdiction. *Hardaway* v. *Illinois Central R.R.*, 9 Misc. 2d 705, 170 N. Y. S. 2d 584; *Internatio-Rotterdam, Inc.* v. *Holland America Line*, 148 N. Y. S. 2d 492; *Greek Tourist Agency, Inc.* v. *Hellenic Mediterranean Lines Co.*, 199 F. Supp. 6; *Vereen* v. *Chicago, Milwaukee, St. Paul & Pacific R.R.*, 209 F. Supp. 919. Cf. *McInnes* v. *Fontainebleau Hotel Corp.*, 257 F. 2d 832; *Dana* v. *Fontainebleau Hotel Corp.*, 34 Misc. 2d 20, 215 N. Y. S. 2d 938. No doubt only a little needs to be added to make out jurisdiction (*Lawson* v. *Pan American World Airways*, 30 Misc. 2d 274, 218 N. Y. S. 2d 822; *Giuliano* v. *Alitalia Airlines, Inc.*, 218 F. Supp. 78; *Del Sesto* v. *TWA*, 201 F. Supp. 879; *Edwards* v. *Atlanta & West Point R.R.*, 197 F. Supp. 686; *Johansen* v. *Gulf and South American S.S. Co.*, 126 F. Supp. 664; but that little is not here.

The contract counts, if they were even literally within the New York process statute (as they are not), would add nothing. The gist of the claims is tort; the tickets do no more than evidence the relation of common carrier and passenger for hire; it is the law of torts that imposes the standard of care and responsibility appropriate to the carrier-passenger relationship, but that standard, and any consequent liability, are not creatures of contract. Cf. *Loehr* v. *East Side Omnibus Corp.*, 259 App. Div. 200, 18 N. Y. S. 2d 529, aff'd 287 N. Y. 670, 39 N. E. 2d 290.

Accordingly, on defendants' motion to quash service, it is

ORDERED that the motion is granted, the action is dismissed and the Clerk is directed to enter judgment that plaintiffs take nothing, and that the action is dismissed for want of jurisdiction without prejudice and without costs.

Brooklyn, New York
January 31, 1964.

JOHN F. DOOLING, JR.
U. S. D. J.

First Opinion, Court of Appeals, Second Circuit, December 9, 1964

No. 83—September Term, 1964.

(Argued October 16, 1964 Decided December 9, 1964.)

Docket No. 28826

NETTIE GELFAND and PHILLIP GELFAND,

Plaintiffs-Appellants,

—v.—

TANNER MOTOR TOURS, LTD. (a California Corporation), TANNER MOTOR TOURS OF NEVADA, LTD. (a Nevada Corporation), TANNER MOTOR TOURS CORPORATION, LIMITED (a Nevada Corporation), TANNER MOTOR TOURS, LTD. (a Nevada Corporation), TANNER MOTOR TOURS LTD. OF CALIFORNIA (a California Corporation) and LUCKY CAB CO. (a Nevada Corporation),

Defendants-Appellees.

Before:

WATERMAN, MOORE and SMITH,

Circuit Judges.

Appeal from an order of the United States District Court for the Eastern District of New York, Dooling, *J.*, dismissing diversity suit for lack of jurisdiction over defendants. Reversed and remanded for further proceedings.

FUCHSBERG & FUCHSBERG (Irving Malchman, Jerome J. Klied, of counsel), New York City, *for Plaintiffs-Appellants.*

O'BRIEN & SHEIL (Denis R. Sheil, William J. Quinlan, of counsel), New York City, *for Defendants-Appellees.*

WATERMAN, *Circuit Judge*:

Plaintiffs, husband and wife, brought suit against the six defendant corporations in the United States District Court for the Eastern District of New York. Jurisdiction was founded on diversity of citizenship, plaintiffs being residents of New York, while defendants are incorporated and have their principal places of business in Nevada and California. Plaintiffs alleged that while riding from Las Vegas, Nevada to Grand Canyon, Arizona in a bus owned and operated by defendants, they were injured when the bus left the highway and crashed into a rock bank. The first three counts in their complaint were based on negligence, the last three on breach of contract of safe carriage. They sought $1,265,000 in damages.

Three of the defendants moved to dismiss the action on the ground that they were not subject to personal jurisdiction in New York. In support of their motion they submitted identical affidavits by two of their officers which consisted of allegations that they had neither representatives nor offices in New York and that they neither solicited nor transacted business in the state. In opposition to the motion, plaintiffs submitted affidavits describing the purchase of their tickets through the Herren-Rogers Travel Service on Long Island, reciting certain representations by the Gray Line Sight-Seeing Companies, Associated, of which defendants are members, and detailing the alleged

business activities of the Gray Line in New York City through Herbert J. DeGraff.

The district court requested these defendants to submit additional affidavits and a copy of the Gray Line tariff. In response, they offered an affidavit by DeGraff relative to his business activities in New York City and his relationship to the Gray Line, an affidavit by an officer of the Gray Line relative to the character of the association and the role of defendants as members, and an affidavit by a partner in Herren-Rogers relative to the particular transaction it had with plaintiffs and the nature of its business generally. Although still somewhat dissatisfied with defendants' presentation, Judge Dooling in a memorandum opinion granted their motion to dismiss the suit. The district court included in its order the three remaining defendants, on the ground that they were mere phantoms. Plaintiffs ask us to reinstate the suit against all six defendants or, at least, to direct a hearing on the question of jurisdiction.

In the absence of a federal statute or rule enlarging the jurisdiction of federal courts, the amenability of a foreign corporation to suit in a diversity case is governed by the constitutionally valid law of the state in which the federal court sits. *Arrowsmith* v. *United Press Int'l,* 320 F. 2d 219 (2 Cir. 1963). Hence the issue presented by this appeal is to be determined in accordance with New York law, insofar as that law is constitutional.

The relevant portions of New York's new Civil Practice Law and Rules provide:

> §301. Jurisdiction over persons, property or status
>
> A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore.

§302. Personal jurisdiction by acts of non-domiciliaries

(a) Acts which are the basis of jurisdiction. A court may exercise personal jurisdiction over any non-domiciliary, . . . as to a cause of action arising from any of the acts enumerated in this section, in the same manner as if he were a domiciliary of the state, if, in person or through an agent, he:

1. transacts any business within the state; . . .

The Civil Practice Law and Rules went into effect on September 1, 1963. This suit was commenced on December 15, 1963, but the accident on which it is based occurred on May 4, 1962. That plaintiffs' cause of action thus accrued before the effective date of the act creates no problem of timing as to §301, which only continues prior New York law. But as to §302, which creates a new basis of jurisdiction, we are faced at the outset with the question of whether the new provision was intended to apply to suits commenced after September 1, 1963 based on events which occurred previously, and, if so, whether such retroactive application is constitutional. Fortunately, we are not obliged to prophesy New York doctrine on this question,[1]

---

1 New York law on this question is not yet entirely clear. In *Simonson v. International Bank*, 14 N. Y. 2d 281, 290, 251 N. Y. S. 2d 433, 440 (1964), the Court of Appeals declared:

"[W]ith the possible exception of cases in which the acts serving as the predicate for jurisdiction under the new section are shown to have been carried out in justifiable reliance on the prior law . . ., CPLR §302 has retroactive effect to the extent of embracing suits instituted after its effective date but based on previously accrued causes of action."

The New York courts have yet to inform us whether the "exception" mentioned by the Court of Appeals is actual rather than merely "possible," and, if so, what constitutes an act "carried out in justifiable reliance on the prior law."

or to render a hypothetical constitutional judgment based on that prophecy. See generally Note, *Retroactive Expansion of State Court Jurisdiction Over Persons,* 63 Colum. L. Rev. 1105 (1963). Even if §302 validly applies to this suit with regard to the question of timing, it does not provide a basis of personal jurisdiction over defendants for other reasons yet to be stated.

§301 preserves traditional New York law, under which "a foreign corporation, not authorized to do business in [the] State, was held amenable to local suit only if it was engaged in such a continuous and systematic course of 'doing business' [there] as to warrant a finding of its 'presence' in [the] jurisdiction." *Simonson* v. *International Bank, supra,* 14 N. Y. 2d at 285, 251 N. Y. S. 2d at 436. Once a foreign corporation is found to be "present" within the state, however, "jurisdiction does not fail because the cause of action sued upon has no relation in its origin to the business [there] transacted." *Tauza* v. *Susquehanna Coal Co.,* 220 N. Y. 259, 268, 115 N. E. 915, 918 (1917). See generally N. Y. Legis. Doc. (1958) No. 13, p. 38. The constitutionality of these doctrines has been approved by the Supreme Court. *International Shoe Co.* v. *Washington,* 326 U. S. 310, 318 (1945); *Perkins* v. *Benguet Consol. Mining Co.,* 342 U. S. 437, 446 (1952).

On the other hand, §302 was enacted to take advantage of New York's newly acquired constitutional power, derived from *International Shoe Co.* v. *Washington, supra,* and its progeny, to subject non-residents to personal jurisdiction based on acts occurring within the state. *Simonson* v. *International Bank, supra,* 14 N. Y. 2d at 288, 251 N. Y. S. 2d at 438-39. The provision is apparently based on that portion of *International Shoe Co.* v. *Washington, supra,* 326 U. S. at 318-19, which holds that "the commission of some single or occasional acts . . . in a state" may be enough to render a person amenable to local suit on causes of action which

"arise out of or are connected with the activities within the state." See generally N. Y. Legis. Doc. (1958) No. 13, pp. 39-40. Inasmuch as §302 was seemingly designed to take full advantage of *International Shoe*, that decision, in the absence of authoritative pronouncements by the courts of New York, furnishes us with our guide to interpretation of the new provision, and the provision itself need not present us with an independent issue as to its constitutionality.

Plaintiffs' first contention is somewhat apart from §301 or §302 as discussed above. They argue that under traditional New York law, a foreign corporation which represents to the public that it is doing business in the state is estopped from denying that fact in order to thwart local jurisdiction. The Gray Line makes such representations in its brochures and its tariff and plaintiffs maintain that these representations are imputable to defendants as members of the association. We find it unnecessary to decide whether a doctrine of jurisdiction by estoppel would apply in this case, for we hold that New York apparently has no such doctrine.

Plaintiffs rely on two New York cases, both over twenty-five years old, which conclude that foreign corporations may be estopped by their public representations from denying that service of process was made upon the proper person under New York law. *Society Milion Athena* v. *National Bank of Greece*, 166 Misc. 190, ——, 2 N. Y. S. 2d 155, 164 (Sup. Ct. 1937), *aff'd*, 253 App. Div. 650, 3 N. Y. S. 2d 677 (1938); *Dreher* v. *Western Doll Mfg. Co.*, 198 App. Div. 21, 189 N. Y. Supp. 422 (1921). It is true that these decisions strongly suggest that the same rule applies to a defense based on lack of presence within the state. But the fact remains that we have not found and have not been cited to any square New York precedents to this effect.

On the contrary, recent New York cases pointing out such representations consider them to be but one of several

elements tending to prove that the foreign corporation is doing business in the state. *International Business Machs. Corp.* v. *Barrett Div. Allied Chem. & Dye Corp.*, 16 App. Div. 2d 487, 229 N. Y. S. 2d 547 (1962); *Rochester Happy House, Inc.* v. *Happy House Shops, Inc.*, 14 App. Div. 2d 491, 217 N. Y. S. 2d 791 (1961). Furthermore, there are leading cases involving such representations in which the courts have concluded that the foreign corporation was not subject to personal jurisdiction in New York. *Miller* v. *Surf Properties, Inc.*, 4 N. Y. 2d 475, 176 N. Y. S. 2d 318 (1958); *MacInnes* v. *Fontainebleau Hotel Corp.*, 257 F. 2d 832 (2 Cir. 1958).

§302 seems to work no change in New York law in this respect. It is true that §302 was apparently designed to take advantage of the state's full constitutional powers and it may well be that it is constitutional for the courts of a state to obtain jurisdiction over non-domiciliaries by estoppel. But §302, however, was specifically based on the principles laid down in *International Shoe Co.* v. *Washington, supra,* and its offspring. Those principles, as illuminated by the thoughtful opinion of Judge Kaufman in *Blount* v. *Peerless Chems. (P. R.) Inc.*, 316 F. 2d 695, 697 (2 Cir. 1963), *cert. denied,* 375 U. S. 831 (1963), reflect the view that "when [a corporation's] activities are given protection by state law, it ill behooves the corporation to complain about appearing there to litigate," and that "the state has an interest in subjecting to its judicial process a corporation whose activities in that state expose its residents to a risk of physical harm or economic loss." These views have little if anything to do with a case involving mere representations of presence within the state. Accordingly we hold that the doctrine of jurisdiction by estoppel seems not to be embraced within the purview of §302.

Plaintiffs next contend that their purchase of tickets from defendants through the Herren-Rogers Travel Service on

Long Island was a sufficient basis for local jurisdiction under §302. The facts set forth in the affidavits relating to this branch of the case are ample and undisputed. Herren-Rogers is an independent travel bureau not formally associated with defendants. In March, 1962, plaintiffs made reservations through Herren-Rogers for an extended tour, one small leg of which involved travel on defendants' bus line, and paid a deposit toward the expense of the entire trip. Herren-Rogers forwarded the reservations to the various companies involved and obtained confirmations. Early in April, plaintiffs paid the balance of the cost of the full tour and received, among other things, two tickets for the journey from Las Vegas to Grand Canyon. Herren-Rogers remitted the payment to the various companies involved, withholding its commission.

§302 is limited, insofar as it is relevant, to "a cause of action arising from . . . business [transacted] within the state." We assume for the sake of argument that the sale of the tickets by defendants to plaintiffs through Herren-Rogers was a business transaction within New York. We cannot, however, agree that plaintiffs' cause of action in tort arose from that sale. The alleged negligence of defendants, the subsequent injury to plaintiffs, and every relevant occurrence connecting these two events, all took place three thousand miles from Long Island, New York. It cannot even be said that the duty of due care owed by defendants to plaintiffs arose in New York, for that duty did not finally arise until plaintiffs boarded defendants' bus in Las Vegas. We are referred to no appellate court cases, nor has our own research disclosed any, which uphold jurisdiction over a personal injury claim on anything like such slender grounds. Compare *Singer* v. *Walker*, 21 App. Div. 2d 285, 250 N. Y. S. 2d 216 (1964); *Gray* v. *American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N. E. 2d 761 (1961).

Plaintiffs' claim for breach of the contract of safe carriage stands on slightly firmer ground for such a claim may ordinarily be pleaded as an independent cause of action under New York law. *Kilberg* v. *Northeast Airlines, Inc.*, 9 N. Y. 2d 34, 38, 211 N. Y. S. 2d 133, 135 (1961). Furthermore, it could be argued that jurisdiction over the typical cause of action based upon a bilateral contract may be grounded solely on the fact that the promises of the plaintiff, a resident of the forum state, and his performance pursuant thereto, both took place within the forum state. Cf. *McGee* v. *International Life Ins. Co.*, 355 U. S. 220 (1957).

This is not a typical contract action, however, for as Judge Dooling noted:

> "The gist of the claims is tort; the tickets do no more than evidence the relation of common carrier and passenger for hire; it is the law of torts that imposes the standard of care and responsibility appropriate to the carrier-passenger relationship, but that standard, and any consequent liability, are not creatures of contract. Cf. *Loehr* v. *East Side Omnibus Corp.*, 259 App. Div. 200, 18 N. Y. S. 2d 529 (1940), aff'd, 287 N. Y. 670, 39 N. E. 2d 290 (1941)."

If New York may not assume jurisdiction over the tort claims which are the gist of this suit, it may not take jurisdiction over the contract claims which are derived therefrom. This result is particularly appropriate in the present case, for the promises of "safe carriage" allegedly breached by defendants, like the duty of due care, are creations of the law implicit in the parties' relationship to each other rather than express undertakings they negotiated.

Plaintiffs do not contend that, under §301, defendants are doing business in New York through Herren-Rogers.

Past decisions, involving considerably closer contacts with the state through local travel agents, preclude any such assertion. *Miller* v. *Surf Properties, Inc., supra; MacInnes* v. *Fontainebleau Hotel Corp., supra.* Plaintiffs' attempt to distinguish these cases in another connection on the ground that they did not involve direct payments to the agent within the state, is unavailing. *Gertsenstein* v. *Peninsular & Oriental Steam Nav. Co.*, 202 Misc. 838, 113 N. Y. S. 2d 360 (Sup. Ct. 1952), *aff'd*, 204 Misc. 459, 126 N. Y. S. 2d 439 (App. T. 1953); *Greek Tourist Agency* v. *Hellenic Mediterranean Lines Co.*, 199 F. Supp. 6 (S. D. N. Y. 1961).

Lastly, plaintiffs contend that jurisdiction under §301 or §302 may be based upon the activities conducted for the benefit of defendants by Herbert J. DeGraff. The affidavit of plaintiffs' counsel alleges that from an office in New York City DeGraff distributes brochures and sells tickets for Gray Line tours, including those of defendants, in the same way as does Herren-Rogers. It also points out that the Gray Line, of which defendants are members, represents in its tariff that it has a sales office in New York City at DeGraff's address, and that DeGraff is its "Regional Vice President—Sales Eastern Division." Finally, the affidavit draws attention to the fact that the Gray Line is listed in the New York City telephone directory, and that its name appears on the building directory of the building in which DeGraff's office is located, on one of the doors leading to DeGraff's office, and on the letterhead of certain correspondence emanating from DeGraff's office.

The affidavit of DeGraff, submitted by defendants, makes no mention of ticket sales for Gray Line members, but acknowledges that for a fixed annual fee he publicizes Gray Line tours among independent travel bureaus in the East and helps to arrange group tours on Gray Line facilities. He asserts that he performs similar services at fixed annual fees for numerous other companies in the travel business,

and that the Gray Line telephone number is shared by all the other companies he represents. He claims that his official Gray Line title is merely a public relations device, used in connection with his work for other companies as well. Finally, his affidavit alleges that he staffs, maintains, operates, and pays for his office himself, independently of the Gray Line or any other travel enterprise.

Plaintiffs contend that, under §302, their cause of action arose out of the business transacted in New York by DeGraff on behalf of defendants, because one of DeGraff's activities is to encourage travel bureaus like Herren-Rogers to sell Gray Line tours. We assume for the sake of the argument that this activity constitutes the transaction of business in New York, but, even so, if plaintiffs' cause of action could not arise out of the sale of the tickets, as we have held above, *a fortiori* it could not arise out of the publicity which may conceivably have contributed to that sale.

Plaintiffs also contend that, under §301, defendants are doing business in New York through DeGraff. We agree that DeGraff may perform a wider variety of services for the benefit of defendants than the mere solicitation and facilitation of individual sales, which was about all that was involved in *Miller* v. *Surf Properties, Inc., supra,* and *MacInnes* v. *Fontainebleau Hotel Corp., supra,* which were cases where jurisdiction was found wanting. On the other hand, the formal connection between DeGraff and defendants would appear not nearly as close as the employer-employee relationship which prevailed in *Barnett* v. *Texas & Pac. Ry. Co.,* 145 F. 2d 800 (2 Cir. 1944), where jurisdiction was upheld. See also *Elish* v. *St. Louis Southwestern Ry. Co.,* 305 N. Y. 267, 112 N. E. 2d 842 (1953). Thus, the present case may fall between the leading authorities, pro and con, concerning jurisdiction over foreign travel corporations.

When close questions of jurisdiction arise, each case must be decided on its own facts. *Blount* v. *Peerless Chems. (P. R.) Inc., supra,* 316 F. 2d at 697; *MacInnes* v. *Fontainebleau Hotel Corp., supra,* 257 F. 2d at 833. Unfortunately, the facts set forth in defendants' affidavits relating to this branch of the case are somewhat sketchy. Indeed, their affidavits were characterized by the district court, not only as "most unimpressive," but also as "hardly very frank." While we are reluctant to impose additional burdens on an already overloaded trial bench, we conclude that this case should be remanded to the district court for a hearing on the question of whether defendants are doing business in New York under §301. Hopefully, the hearing will make clear the full scope and importance of DeGraff's activities on behalf of defendants and the closeness of the relationship between DeGraff and defendants through the Gray Line of which defendants are members.

Reversed and remanded for further proceedings in accord with this opinion.

MOORE, *Circuit Judge* (concurring in the result):

I concur in the result only because in practically every jurisdictional case the correct legal answer is best obtained from the fullest possible development of the facts. I do not join in the assumption of my colleagues that DeGraff's public relations activities for Gray Line would or could justify a holding that these operating defendants, merely members of the Gray Line association, were transacting business in New York. Such an activity would be far less a "holding out" than the situations in the *Surf Properties, supra,* or *Fontainebleau Hotel, supra,* cases. Furthermore, DeGraff must be shown in my opinion to have been actively engaged in the type of business on behalf of these particular defendants which would result in jurisdictional conse-

quences for them within the principles of the New York law so well analyzed and stated in Judge Waterman's opinion. I am not opposed to further development of the facts but I am not prepared to intimate (and I do not believe that my colleagues do) that Judge Dooling's views of the New York law were inaccurate or unsound.

Second Opinion of Judge Dooling, December 27, 1966

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

63 C 1281

NETTIE GELFAND and PHILIP GELFAND,

Plaintiffs,

—against—

TANNER MOTOR TOURS, LTD. (a California Corporation), TANNER MOTOR TOURS OF NEVADA, LTD. (a Nevada Corporation), TANNER MOTOR TOURS CORPORATION, LIMITED (a Nevada Corporation), TANNER MOTOR TOURS, LTD. (a Nevada Corporation), TANNER MOTOR TOURS LTD. OF CALIFORNIA (a California Corporation) and LUCKY CAB CO. (a Nevada Corporation),

Defendants.

Appearances:

RICHARD E. SHANDELL, Esq. (Messrs. Fuchsberg & Fuchsberg of Counsel), for plaintiff

DENIS R. SHEIL, Esq. for defendants

DOOLING, *D.J.*

After remand upon the reversal by the Court of Appeals (339 F. 2d 317) of the earlier judgment dismissing the action for want of personal judisdiction, the parties pursued discovery proceedings, and thereafter a hearing was held at which Herbert J. DeGraff testified. On the basis of the evidentiary material as thus amplified the facts re-

lated to the jurisdictional issue are as of December 1963 to have been the following (the present tense is used for simplicity):

1. The action, filed December 5, 1963, is for personal injuries allegedly arising out of an accident to a sight-seeing bus that occurred on May 4, 1962, on State Highway 64 in Arizona during a sight-seeing trip that originated in Las Vegas, Nevada.

2. Copies of the summons and complaint were delivered to a representative of defendants Tanner Motor Tours, Ltd. (a California corporation) and Tanner Motor Tours of Nevada, Ltd. in Los Angeles on December 12, 1963, to a representative of defendant Tanner Motor Tours, Ltd. in Las Vegas, Nevada, on December 9, 1963, and to a representative of Lucky Cab Co. (a Nevada corporation) in Las Vegas, Nevada, on December 9, 1963; in addition copies of the summons and complaint were delivered to Herbert J. DeGraff on January 2, 1964, in New York City for the same three companies.

3. Defendants Tanner Motor Tours, Ltd., Tanner Motor Tours of Nevada, Ltd., and Lucky Cab Co. (hereinafter collectively referred to as defendants) on January 8, 1964, served their joint motion to quash the purported service of summons on the ground that they neither solicit nor transact business in and are not subject to the service of process in New York.

4. None of the defendants has qualified to do business in New York, and none has an office, or telephone listing, or building-directory listing in its name in New York; no officer of any of defendants has his office in New York; and no employee of any of defendants works in New York.

5. Defendants operate motor transportation services of several kinds in the far western states; none of the transportation services that they render extends into, or either originates or terminates in New York.

A. Defendant Tanner Motor Tours, Ltd. (California) operates sight-seeing and charter bus services in Los Angeles, Orange and San Diego Counties in southern California; it also performs certain interstate services of the Tanner Gray Lines, including certain interstate services related to Tanner Motor Tours of Nevada, Ltd.

B. Tanner Motor Tours of Nevada, Ltd. operates sight-seeing, charter and transit bus services in Clark County, and also operates an Avis-Rent-a-Car license service.

C. Lucky Cab Co. operates a taxicab service in Las Vegas and Clark County, Nevada.

6. Defendants are three among a larger number of companies under common ultimate ownership; the "parent" corporation of the group of companies was in 1942 and, apparently, still is Tanner Motor Livery, Ltd.; Tanner Motor Livery, Ltd. is an Avis licensee authorized to use the name Avis in rent-a-car activity in certain southern Californian cities. Tanner Motor Livery, Ltd. is not named as a defendant. [See Rule 15 (c) as amended].

7. The defendants are members of Gray Line Sight-Seeing Companies Associated, Inc. ("Gray Line Associated") and as such are licensed to and do use the words "Gray Line" as a prominent part of their trade names.

8. Gray Line Associated does not operate any sight-seeing or tour services anywhere; it is a membership cor-

poration and operates as a service organization in the interest of its more than ninety members; it conducts national advertising programs on its members' behalf, runs national public relations campaigns in furtherance of the sight-seeing and tour service business of its membership, and contacts travel agents and others to induce them to use the facilities of Gray Line member companies; Gray Line Associated had at all the times in question a contract with Herbert J. De Graff Associated, Inc. ("De Graff Inc.") respecting representation of Gray Line Associated in the eastern United States.

9. Member companies of Gray Line Associated are required to pay dues and defendants paid dues as follows (Lucky Cab Co. paying none and no data being given on other Tanner companies that may be members):

Year	*Tanner Motor Tours, Ltd.*	*Tanner Motor Tours of Nevada, Ltd.*
1960	$24,690.	$3,277.
1961	26,145.	3,850.
1962	26,140.	4,739.
1963	20,950.	2,705.

10. The member companies of Gray Line Associated include companies operating sight-seeing services in cities throughout the United States and in Canada, Mexico, Australia, Hong Kong and Japan.

11. Gray Line Associated arranges for sales service representation in New York (De Graff Inc.), Chicago and San Francisco; the representation obtained in the three cities is over-all representation of Gray Line member companies and the services they offer in relation to travel

agents, retail and wholesale, and in relation to airlines, railroads, hotels, and steamship companies offering other travel services suited for use or packaging with motor tour services; representation of Gray Lines by De Graff Inc. in New York and by the Gray Line Associated representatives in Chicago and San Francisco is not selective representation of particular Gray Line companies as against other Gray Line companies, but of all Gray Line companies.

12. In New York Gray Line Associated is listed as having an office at 501 Madison Avenue. The office referred to is that maintained by De Graff Inc.

13. Gray Line Associated is a Maryland corporation and its principal place of business is in Chicago, Illinois. The Tanner companies form the largest single-ownership group in Gray Line Associated; at the times in question Tanner Gray Lines operated in Los Angeles, San Diego, Santa Barbara, Las Vegas, Phoenix, and Tucson; the Tanner Gray Line companies accounted in the year 1963 for approximately 14 or 15% of the total sight-seeing business of the Gray Line companies.

14. De Graff, Inc. at the times in question had a written contract with Gray Line Associated under which it was retained, for $23,500 a year, payable monthly in advance, "in the promotion and development of [Gray Line Associated's] sight-seeing business"; the duties of De Graff Inc. were:

"a) To represent Gray Line as travel representative and agent in the eastern portion of the United States as specified by Executive Committee directives;

"b) To familiarize itself fully with all services and facilities offered by Gray Line members;

"c) To contact and fraternize with travel forwarders situated in the eastern portion of the United States;

"d) To take orders for folders and other printed material prepared for distribution by Gray Line and Gray Line members;

"e) To gather all available information on specialized group movements and forward such advice to interested Gray Line members;

"f) To compile data on all conventions which will occur in cities where there are interested Gray Line members and forward such reports to such members;

"g) To advise interested Gray Line members of all travel movements and to solicit such business for Gray Line members;

"h) To maintain an office in New York, properly staffed to render the above service and assist in processing all Gray Line orders;

"i) To promote the overall welfare of Gray Line."

The agreement terminated automatically if Herbert J. De Graff was disabled; he was required to devote his best efforts and entire time to advance the interests of Gray Line but he and De Graff Inc. could represent other clients allied with the travel industry if Gray Line Associated's president approved. De Graff Inc. was "retained" under the agreement "as an independent contractor." De Graff Inc. was required to pay "all of its own expenses including the maintenance of a necessary office and the costs of all involved travel."

15. The contract of De Graff Inc. is with the Gray Line Associated. With the exception of the camera transaction (as to which see below) it has never been paid for anything directly by any of the defendant companies, and Herbert J. De Graff is not on the payroll of any of the member companies of Gray Line Associated and is not an officer, director or stockholder of any of the defendants, nor have any of Herbert J. De Graff's companies been stockholders in the defendant companies.

16. In 17 offices around the world De Graff Inc. represents over three hundred clients in the travel business including over 200 hotels and four airlines, and conducts public relations activities for two bus touring companies and Hong Kong Tourist Association.

17. Herbert J. De Graff estimates that the most important work that De Graff Inc. does for the Gray Line Associated is the work with the major wholesale travel agents and the major transportation carriers; with them his salesmen and he arrange package tours containing Gray Line elements. (Exhibit 7 is a "package tour" prepared by Mr. De Graff, but containing no Gray Line elements).

18. In addition to its activities with travel wholesalers and in general solicitation of travel agents for Gray Line business, De Graff Inc. clears reservations for the Grand Canyon Tour of the Gray Line of Las Vegas (apparently a trade name for defendant Tanner Motor Tours of Nevada, Ltd.).

A. Reservations are required on this tour since it includes an outside element, hotel rooms.

B. De Graff Inc. confirms reservations for this tour without obtaining Les Vegas approval until informed from Las Vegas that space is no longer available on a particular tour.

C. Any request for a reservation for more than three or four rooms is considered a request for a group reservation and is never booked without consulting Las Vegas.

19. In each of the years 1962, 1963 and 1964 approximately 3,000 of the 7,000 total passenger reservations on the Grand Canyon tour were cleared through De Graff Inc. The annual value of the bookings the reservations for which were confirmed through De Graff Inc. for the Grand Canyon tour would total approximately $120,000. De Graff Inc. does not handle either payment or actual issuance of the tickets. (Tr. 122-123).

20. Other activities are performed by De Graff Inc. for Gray Line Associated. At the request of a travel agent De Graff Inc. will book transfers to and from hotel, airport or station. (Exhibit 3 is a copy of a transfer reservation booked through De Graff's office). On occasion the office has booked Avis car rentals for the Las Vegas Gray Line, but no commissions are received for that service. De Graff Inc. has also handled some travel agent complaints about Gray Line service and some Gray Line complaints about agents' failure to pay their bills.

21. On behalf of the Gray Line Associated Herbert De Graff arranged for the purchase of 5,000 cameras for Gray Line Motor Tours, Tanner Motor Livery in Los Angeles, California in 1965. No fee was received for this work. The cameras were given away at an airline Christmas party as a gift from the Tanner Gray Line Co.

22. Herbert J. De Graff holds the title of Vice President of Sales for the Eastern Region of Gray Line Associated. That office imposes on him no duties beyond those provided in the contract. (Tr. 101-102).

23. Plaintiffs made their reservations for the Grand Canyon tour through Herren-Rogers Travel Service, Lynbrook, Long Island, New York, as part of an extended tour which included $1,071.26 of billings for transportation and hotel accomodations; Herren-Rogers obtained the Grand Canyon tour confirmations by writing to Tanner Gray Lines, Las Vegas; Herren-Rogers delivered the "Service Confirmation" to plaintiffs on a "Tanner Gray Line Service Confirmation" evidently sent from a Tanner office.

24. Neither De Graff Inc. nor Gray Line Associated but the travel agents are the entities which are primarily engaged in selling such transportation as defendants offer, and who issue tickets or coupons or orders for the transportation service, collect the price, retain a commission and remit the balance to the tour companies.

25. Issuance of tickets, orders or coupons for transportation service, collection and remittance do not pass through the Gray Line Associated or De Graff Inc. organizations; neither Gray Line Associated nor De Graff Inc. is paid a commission for selling specific transportation.

26. The activity of De Graff Inc. in acting as a central reservation office through which travel agents can make or confirm reservations is an alternative to the usually slower and more inconvenient method of having the travel agent communicate directly with the bus line or hotel offering the desired travel service.

27. The Gray Line Associated and De Graff Inc. services to defendants and others similarly situated are in substance general promotional, marketing, advertising and advisory services and, in the case of De Graff Inc., liaison services with travel agents and reservation-coordinating and confirmation services.

28. There is no evidence that and it is not found that Gray Line Associated or De Graff Inc. or Herbert J. De Graff was expected or required to or did act under the direction or control of defendants as would an agent or servant.

29. There is no evidence that and it is not found that Gray Line Associated or De Graff Inc. or Herbert J. De Graff was expected or authorized to or did in any way promote or advance the interests of any one member company of Gray Line Associated in preference to or at the expense of any other Gray Line Associated member company; however Gray Line Associated, De Graff Inc. and Herbert J. De Graff were engaged in promoting and advancing the interests of the member companies of Gray Line Associated as against others offering rival travel attractions.

30. During the years in question C. H. Tanner, president of each of the defendant companies and of Tanner Motor Livery, Ltd., was also president of Gray Line Associated; his presidency ended in October 1964.

31. Tanner Motor Livery, Ltd. has since prior to 1958 been an Avis Rent A Car Inc. licensee in the rent-a-car business in Southern California and Nevada. On various occasions vehicles owned by Livery have arrived in New York and have subsequently been returned to the far west

through rental by local Avis licensees to individuals driving west. During the six months ended April 5, 1966, Avis collected, through its central billing department located in New York, over $10,000 for rentals of cars by Tanner Motor Livery, Ltd. Central billing has existed for Tanner since 1958.

The questions now open for decision are those that arise under New York Civil Practice Law and Rules Section 301 and not those under Section 302 which were disposed of with finality on appeal (339 F. 2d at pages 320-323). The service of process, then, must under Rule 4(d)(7) be tested by the standards applicable to NYCPLR §§301, 313. *Arrowsmith* v. *United Press International,* 2d Cir. 1963, 320 F. 2d 219; *Eck* v. *United Arab Airlines, Inc.,* 2d Cir. 1966, 360 F. 2d 804, 810. *Cf. Cook* v. *Bostitch, Inc.,* 2d Cir. 1964, 328 F. 2d 1.

In words at least, New York has followed *Green* v. *Chicago Burlington & Quincy Ry.,* 1907, 205 U. S. 530 in holding that even if it is "obvious that the defendant was doing . . . a considerable business [in a district] of a certain kind, although there was no carriage of freight or passengers," where the business so done is "nothing more than that of solicitation," that business "is not enough to bring the defendant within the district so that process can be served on it." But while repeatedly treating the *Green* case as relevant and authoritative (although, strictly, it was a federal statutory decision), New York has held that a railroad that neither has lines in New York nor solicits business there may be doing business in New York if a significant part of its managerial activities is carried on in New York (*Pomeroy* v. *Hocking Valley R.R.,* 1916, 218 N. Y. 530, 535-536); it has held that a railroad which has no lines in New York but solicits business there and carries on some managerial activities in New York is doing business

in New York (*Elish* v. *St. Louis Southwestern Ry.*, 1953, 305 N. Y. 267); and it may be thought to have held that jurisdiction will be exercised over an air carrier which has no routes touching New York if it solicits business in New York through another carrier under an elaborate contract entitling the defendant carrier also to a range of services having little evident practical application to New York. *Berner* v. *United Airlines*, 1st Dept. 1956, 3 App. Div. 2d 9, 157 N. Y. S. 2d 884, aff'd., 1957, 3 N. Y. 2d 1003. But where the New York Court has been satisfied that there was "mere solicitation" of business for an out-of-state hotel, and little, if anything more, and that the solicitation was carried on through one who made a business of such solicitation for a number of hotels, the Court has declined jurisdiction. *Miller* v. *Surf Properties, Inc.*, 1958, 4 N. Y. 2d 475. *Cf. MacInnes* v. *Fontainebleau Hotel Corp.*, 2d Cir. 1958, 257 F. 2d 832; *Turner* v. *Jack Tar Grand Bahama, Ltd.*, 5th Cir. 1965, 353 F. 2d 954.

Bryant v. *Finnish National Airline*, 1965, 15 N. Y. 2d 426 marks an evident departure. It cannot be regarded as presenting decisively different facts from those in *Green* v. *Chicago, Burlington & Quincy Ry., supra;* its evident purpose is to discard the "mere solicitation" and "solicitation plus" technique of factual analysis and, without disturbing previous holdings, to substitute "a simple pragmatic" test. Jurisdiction over an airline with no routes touching New York was sustained although its local activity was "mere solicitation" plus an evidently trifling amount of intimately related activity. The *Miller* case was distinguished on the ground that the local solicitor represented many hotels. The *Berner* case was invoked as also involving an airline with no route touching New York, and it was noted that the passenger killed in the

crash of the airliner in the *Berner* case had bought his ticket in New York from another corporation "which was the general sales and traffic agent in New York City" of the foreign airline. The Court closed its discussion in the *Bryant* case by saying in summary that defendant had a leasehold, employees, and a bank account in New York, and that the New York office conducted some public relations and publicity, maintained liaison with other airlines and with travel agencies, forwarded requests for reservations to Europe, and helped to generate business. The activities so described constitute solicitation without any definable or measurable addition. *Eck* v. *United Arab Airlines, Inc.*, 2d Cir. 1966, 360 F. 2d 804, 810-811, may be taken to note and give effect to the change in emphasis introduced by the *Bryant* case. It is difficult to avoid the conclusion that the New York Court has at length precisely rejected the exact holding of the *Green* case. *Cf. Turner* v. *Jack Tar Grand Bahama Ltd., supra,* 353 F. 2d at 956.

However, the Court's discussion of the *Miller* case and its emphasis on the directness of Finnish National Airline's activities in this state do not suggest that such advantages as defendants unquestionably derived from the local activities of the travel agents, Gray Lines Associated and De Graff will automatically take the place at the sort of direct relation displayed in the *Finnish National Airline* case. There must be, it would appear, some integrating factor, like directness of control, or the formalization of service, obligations of the kind covered by explicit contract in the *Berner* case, to establish the sort of continuity and substantiality of relation that, by pragmatic testing, leads to the conclusion that defendants should be suable in New York.

The Gray Line Associated-De Graff Inc. activity here presented is too generalized, collateral and indirect. Its characterizing elements are that it is neither directly controlled by defendants, nor is it integral to defendants transactions of sale, nor is it particular to defendants, but it is an independently constituted set of activities, related primarily to overall sales promotion, and general to the ninety Gray Line companies, and, in the case of De Graff Inc. activity, to many hotels and a certain number of other carriers. No doubt the case presents, as do all cases of this class, the evident fact that through these means defendants promote the marketing in New York to New Yorkers of a service that is rendered elsewhere. But that is not enough, perhaps because it can be done, and done effectively, through others without any "presence" of the defendant in New York, and it is the super-addition of something that is "presence" (as in the *Bryant* case), or substitutional presence (as in the *Berner* case through elaborated contract service), that makes the difference between being subject to and being freed of local jurisdiction. *Cf. Hanson* v. *Denckla,* 1958, 357 U. S. 235, 253-254; *Eck* v. *United Arab Airlines, Inc., supra,* 360 F. 2d at 811.

The relation of Herbert J. De Graff and of De Graff Inc. to defendants is not of the kind that satisfies the pragmatic test of the *Bryant* case. The camera transaction is not germane; it was a random episode and not a transaction in the regular course of the business of Tanner or of De Graff or of the New York office of De Graff Inc. The De Graff activities were not so directly related, so intrinsic to the business of defendants as was the activity of the travel agents. While no doubt valuable to the ninety Gray Line companies and particularly to Tanner Motor Tours of Nevada, Ltd. in relation to the Grand Canyon

tour, the DeGraff services were not in the main stream of ticket selling. The reservation clearing house was to the travel agents a convenience rather than a necessity (for they could by-pass De Graff Inc. in making reservations). The services were, otherwise, directed to the more general promotion of good will and business relations and the devising of new tour-arrangements; they were comparable to the services offered by one who—like a public relations man, or management consultant, or industrial designer—makes a calling of practising a particular expertise for those who are prepared to engage his services. In addition, the De Graff services were rendered to others as well as to defendants, they were rendered to defendants only equally and simultaneously with their being rendered also and on the same terms to other Gray Line companies, and they were rendered only indirectly through the Gray Line Associated relation.

The Gray Line Associated arrangement was not of the kind that could, analogously to the *Berner* case, transform Gray Line Associated into a local co-operative directly representative of each Gray Line member company. The evidence of Gray Line Associated activity is very slight and what evidence there is marks it as not performing any activities in New York relevant to the present issue except as the De Graff Inc. activities, already discussed, are treated as also being activities of Gray Line Associated.

The facts relating to the Tanner Motor Livery, Ltd., relation to Avis are theoretically intriguing, but there is no foundation here for the suggestion that if Tanner Motor Livery, Ltd. is doing business in New York, its supposed subsidiaries must also be doing business here. Contrast *Turner* v. *Jack Tar Grand Bahama, Ltd., supra* 353 F. 2d at 956, and *Walkovsky* v. *Carlton,* 1966, —— N. Y.

2d ——, 35 L. W. 2330, with *Taca International Airlines, S. A.* v. *Rolls Royce of England, Ltd.*, 1965, 15 N. Y. 2d 97.

An over-view may suggest that the concourse of all the elements present on any truly pragmatic test should lead to the conclusion here that defendants are suable in New York. But the case is not really a close one although it has been hotly contested. The diligence of counsel in arraying and analyzing the data shows that what is here is refinement of scrutiny rather than substantiality of activity. Once it is concluded that defendants offering a wholly out-of-state service are not suable in New York merely because they exploit New York as a market through the local network of travel agencies, the search for the added factors that will make such a defendant suable must produce something more substantial than such indirect, generalized and shared promotional facilities as defendants here utilized. *Cf. Miller* v. *Surf Properties, Inc., supra; Guile* v. *Sea Island Co.*, N. Y. Co. 1946, 11 Misc. 2d 496, 66 N. Y. S. 2d 467, aff'd., 1st Dept. 1947, 272 App. Div. 881, 71 N. Y. S. 2d 911; *MacInnes* v. *Fountainebleau Hotel Corp. supra; Wiederhorn* v. *The Sands, Inc.*, S. D. N. Y. 1956, 142 F. Supp. 448. See *Alfa* v. *Compagnie Generale Transatlantique*, E. D. Mo. 1963, 228 F. Supp. 874.

It is tragic that federal courts continue to "try" unreal issues of "jurisdiction." *Cf. First Flight Co.* v. *National Carloading Corporation*, E. D. Tenn. 1962, 209 F. Supp. 730, 735 *et seq.* As the 1963 amendment to Rule 4 as affecting "additional parties" again demonstrates, federal process has no genuine concern with state boundaries or factitious problems of "jurisdiction" invented as parodies of state law realities. The only substantial issue in every such case as the present one is not "jurisdiction" but proper place of trial. Yet if process were sustained here or is sus-

tained on appeal, that threshold and real issue—proper place of trial—would still be unadjudicated. The hopeful avenues of thought at least opened by *Goldlawr, Inc.* v. *Heiman,* 1962, 369 U. S. 463, appear to open no prospect here, since the case is in the correct district under 28 U. S. C. §1391(a) and is therefore not transferable under 28 U. S. C. §1406(a). But that case invites the conclusion that in every such case as this the interests of justice require that the federal courts be empowered to proceed at once in the worthwhile function of determining the proper place of trial under 28 U. S. C. §1404(a). To borrow the disabilities that the fourteenth amendment imposes on the state courts—with ever diminishing rigor—and labor to imitate their involuntary and unwanted defects of power, is not sensible, and it serves no federal purpose.

On defendants' motion to dismiss the action for want of personal jurisdiction, it is

ORDERED that the action be dismissed for want of jurisdiction and the Clerk is directed to enter judgment that plaintiffs take nothing and that the action is dismissed without prejudice and without costs for want of jurisdiction.

Brooklyn, New York
December 27, 1966.

JOHN F. DOOLING, JR.
U.S.D.J.

Second Opinion of Court of Appeals, Second Circuit, November 13, 1967

No. 77—September Term, 1967.

(Argued October 13, 1967 Decided November 13, 1967.)

Docket No. 31156

NETTIE GELFAND and PHILLIP GELFAND,

Plaintiffs-Appellants,

—v.—

TANNER MOTOR TOURS, LTD. (California Corporation), TANNER MOTOR TOURS OF NEVADA, LTD. (Nevada Corporation), TANNER MOTOR TOURS CORPORATION, LIMITED (a Nevada Corporation), TANNER MOTOR TOURS, LTD. (a Nevada Corporation), TANNER MOTOR TOURS, LTD. OF CALIFORNIA (a California Corporation) and LUCKY CAB CO. (a Nevada Corporation),

Defendants-Appellees.

Before:

LUMBARD, *Chief Judge,*
SMITH and FEINBERG, *Circuit Judges.*

Appeal from judgment of the United States District Court for the Eastern District of New York, John F. Dooling, Jr., *J.*, dismissing the action for want of personal jurisdiction over defendants.

Reversed.

RICHARD E. SHANDELL, New York, N. Y. (Fuchsberg & Fuchsberg, New York, N. Y., on the brief), *for plaintiffs-appellants.*

WILLIAM J. QUINLAN, New York, N. Y. (Denis R. Sheil, New York, N. Y., on the brief), *for defendants-appellees.*

LUMBARD, *Chief Judge*:

The sole question on this appeal is whether defendant corporations are doing business in New York through their promotional representative, Herbert J. DeGraff, so as to give the district court personal jurisdiction over them under traditional principles of New York law as preserved by §301 of New York Civil Practice Law and Rules. All other grounds for *in personam* jurisdiction over defendants were considered and rejected in an earlier opinion of this court, 339 F. 2d 317 (2 Cir. 1964) when we remanded the case for further findings on the issue now before us. On remand, the district court again found that defendants' activities in New York were not sufficient to warrant a finding that they were doing business in New York. Upon the additional evidence now before us and in light of a New York opinion written after the decision below, we reverse.

The plaintiffs, New York residents, brought suit for injuries sustained on May 4, 1962 when a wheel broke off a Gray Line bus in which they were riding in Arizona en route from Las Vegas to the Grand Canyon. Mr. and Mrs. Gelfand sued six corporate defendants. Three defendants have moved to dismiss the complaint. Although the other three named defendants did not appear the district court dismissed the action against all six defendants. The three

moving defendants are Tanner Motor Tours, Ltd. (California), Tanner Motor Tours of Nevada, Ltd. and Lucky Cab Co. Tanner (California) operates sightseeing and charter bus services in Southern California and also performs interstate services for Tanner (Nevada). That corporation operates sightseeing and charter bus service in Clark County, Nevada, and also operates a car rental agency. The district court assumed, but did not make a finding, that Tanner (Nevada) operated the Grand Canyon tour. The record leaves open the possibility that Tanner (California) operated some or all of the tour buses. Lucky Cab Co. operates a taxicab service in Las Vegas and Clark County, Nevada. Defendants are related companies under common ownership. The parent company is Tanner Motor Livery, Ltd., not named as defendant in this suit.

The moving defendants also are members of Gray Line Sight-Seeing Companies Associated, Inc., a non-profit membership corporation organized under Maryland law. As such they are licensed to use the words "Gray Line" in promoting their tours. Gray Line Associated does not operate any sightseeing or tour services of its own. Its expenses are met from dues paid by more than 90 members. The Tanner companies account for approximately 14 or 15% of the total sightseeing business of the Gray Line companies.

Gray Line Associated conducts national advertising programs and public relations campaigns and contacts travel agents to induce them to use its members' facilities. It has a contract with Herbert J. DeGraff Associated, Inc. to act as its sales service representative. In New York, Gray Line Associated is listed at an office maintained by DeGraff Associated, Inc. at 501 Madison Avenue. Mr. Herbert J. DeGraff holds the title of Vice President of Sales for the

Eastern Region of Gray Line Associated. However that position imposes no duties on him beyond those provided in the contract between Gray Line Associated and his organization. In consideration of an annual fee of $23,500, DeGraff Associated, Inc. agreed:

"A. To represent Gray Line as travel representative and agent in the Eastern portion of the United States as specified by Executive Committee directives;

"B. To familiarize itself fully with all services and facilities offered by Gray Line members;

"C. To contact and fraternize with travel forwarders situated in the Eastern portion of the United States;

"D. To take letters for folders and other printed material prepared for distribution by Gray Line and Gray Line members;

"E. To gather all available information on specialized group movements and forward such advice to interested Gray Line members;

"F. To compile data on all conventions which will occur in cities where there are interested Gray Line members and forward such reports to such members;

"G. To advise interested Gray Line members of all travel movements and to solicit such business for Gray Line members;

"H. To maintain an office in New York properly staffed to run the above services and assist in processing all Gray Line orders;

"I. To promote the overall welfare of Gray Line."

The agreement would terminate automatically if Herbert J. DeGraff was disabled. DeGraff Associated represents

many other clients in the travel business besides Gray Line Associated.

The court below found that DeGraff Associated was retained as an independent contractor by Gray Line Associated. Mr. DeGraff did not receive direct payment from any of the defendants for any of the services he performed and he is not on the payroll of any of them nor an officer, director or stockholder of any of them. There was no evidence that DeGraff or his corporation were under the control of defendants or that Gray Line Associated was under the control of Tanner, although the president of the Tanner corporations, C. H. Tanner, was also president of Gray Line Associated until October 1964.

Mr. DeGraff's most important work for Gray Line Associated was in arranging package tours with major wholesale travel agents and transportation carriers. However DeGraff also provided a special service for whichever defendants ran the Grand Canyon tour. Although under no contractual obligation to the Tanner corporations, DeGraff Associated cleared reservations for the Grand Canyon tour. Until informed by Gray Line of Las Vegas, the promotional name used by defendants who operated the Grand Canyon tour, that space was no longer available, DeGraff confirmed reservations, except group reservations, without obtaining Las Vegas' approval. In 1962, 1963 and 1964, approximately 3,000 of 7,000 total annual passenger reservations on the tour were cleared and confirmed by DeGraff. The value of the bookings confirmed through DeGraff Associated each year was approximately $120,000. Six of DeGraff's clerks spent part of their time working on Grand Canyon reservations. Mr. DeGraff testified that without his reservation service the tour could not be effectively merchandised.

The amenability of the defendant corporations to suit in a federal diversity action is governed by the law of the

state in which the federal court sits, unless it should be found not to comply with constitutional requirements. *Arrowsmith* v. *United Press International,* 320 F. 2d 219 (2 Cir. 1963). This suit, having been brought in the Eastern District of New York, we must look to New York law.

New York's highest court recently said in *Frummer* v. *Hilton Hotels International, Inc.,* 19 N. Y. 2d 533, 281 NYS 2d 41, 43-44 (1967):

> "A foreign corporation is amenable to suit in our courts if it is 'engaged in such a continuous and systematic course of 'doing business' here as to warrant a finding of its 'presence' in this jurisdiction. . . . (See, e.g., Bryant v. Finnish Nat. Airline, 15 N. Y. 2d 426, 430, 260 N. Y. S. 2d 625, 627, 208 N. E. 2d 439, 400 . . . . ; Berner v. United Airlines, 3 N. Y. 2d 1003, 170 N. Y. S. 2d 340, 170 N. Y. S. 2d 340, 147 N. E. 2d 732 . . . .) Although 'mere solicitation' of business for an out-of-state concern is not enough to constitute doing business (Miller v. Surf. Prop., 4 N. Y. 2d 475, 480, 176 N. Y. S. 2d 318, 320, 151 N. E. 2d 874, 876. See International Shoe Co. v. State of Washington, 326 U. S. 310, 315, 66 S. Ct. 154, 158 . . .), due process requirements are satisfied if the defendant foreign corporation has 'certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'." (*International Shoe Co.* v. *State of Washington,* 326 U. S. 310, 316, 66 S. Ct. 154, *supra; see Simonson* v. *International Bank,* 14 N. Y. 2d 281, 286, 251 N. Y. S. 2d 433, 436, 200 N. E. 427, 429, *supra.*) (Citations partially omitted.)

Judge Dooling found that there was no personal jurisdiction over the defendant corporations because their con-

tacts with New York through Gray Line Associated and DeGraff Associated lacked "some integrating factor, like directness of control, or the formalization of service, obligations of the kind covered by explicit contract in the Berner case, to establish the sort of continuity and substantiality of relation that, by pragmatic testing, leads to the conclusion that defendants should be suable in New York." The *Frummer* case, decided after Judge Dooling's opinion, indicates that DeGraff's activities included the "integrating factor" which the district court believed lacking.

In *Frummer* v. *Hilton Hotels International, Inc., supra,* plaintiff was injured in the London Hilton Hotel. He sued Hilton Hotels (U. K.) Ltd., lessee and operator of the hotel and a British corporation, in New York. The New York Court of Appeals found that the corporation was doing business in New York "in the traditional sense" because the same services which were provided by the New York office of the defendant in the *Bryant* case, *supra,*[1] were provided for the defendant in *Frummer* by Hilton Reservation Service, a non-profit corporation owned in common by the Hilton corporations. In addition, unlike defendant's New York office in *Bryant,* Hilton Reservation Service accepted and confirmed reservations. The court in *Frummer*

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1 In *Bryant* v. *Finnish National Airlines, supra,* defendant corporation was held subject to personal jurisdiction in New York even though it did not fly planes outside of Europe. Defendant's only contacts with New York were through maintenance of a one and a half room office in New York City staffed by four employees. The court stated that "the test for 'doing business' is and should be a simple and pragmatic one . . . ." 15 N. Y. 2d at 432, 260 N. Y. S. at 629. The court's simple and pragmatic holding was that having a lease on a New York office, employing four people, having a bank account with an average balance less than $2,000, doing public relations and publicity work including maintaining contacts with other airlines and travel agencies and transmitting requests for space to Europe and helping to generate business in New York "should be enough."

specifically disavowed any reliance upon the corporate relationship of the two Hilton subsidiaries other than that "it gives rise to a valid inference as to the broad scope of the agency in the absence of an express agency agreement such as the one which existed in the *Berner* case." 281 N. Y. S. 2d at 45.

The *Frummer* opinion distinguished *Miller* v. *Surf Properties, supra,* upon which the district court in this case relied. In *Miller,* plaintiff was injured in a Florida hotel owned and operated by defendant and brought an action in New York. Plaintiff claimed that defendant had sufficient contacts with New York to be subject to suit because of an oral agreement with Broadway Resort Service. Telephones at Broadway's New York office were listed in the names of between 40 and 50 hotels. For an annual fee of $750.00 Broadway answered inquiries and forwarded requests for space to Florida for approval. Reservations did not become final until accepted by the hotel in Florida. The *Frummer* court stated that in *Miller* the services performed in New York amounted to little more than rendering telephone service and mailing brochures. Without confirmation of reservations by the New York agent this was "mere solicitation."

In our view, the decisive test is that upon which the court in *Frummer* relied, "the [reservation] Service does all the business which [defendant corporation] could do were it here by its own officials." 281 N. Y. S. 2d at 44. In the context of the *Frummer* case, we take this to mean that a foreign corporation is doing business in New York "in the traditional sense" when its New York representative provides services beyond "mere solicitation" and these services are sufficiently important to the foreign corporation that if it did not have a representative to perform

them, the corporation's own officials would undertake to perform substantially similar services.

Mr. DeGraff testified that the reason his office booked reservations for Tanner's Grand Canyon tour was that "this was the only way that you could merchandise that tour of the Grand Canyon." It is clear from the record that unless defendants had arrived at this working arrangement with DeGraff or a similar arrangement with some other New York representative, they would either have had to open their own reservation office in New York or give up the Grand Canyon tour. Since DeGraff confirmed the tour reservations in New York and in addition maintained a broad range of services similar to those of Hilton Reservation Service or the New York office of defendant corporation in the *Bryant* case, whatever DeGraff's relationship to the other members of the Gray Line Association might be, DeGraff was acting as an agent for the Tanner company or companies operating the Grand Canyon tour to a sufficient extent to satisfy the doing business test as stated by the New York Court of Appeals in the *Frummer* case.

We conclude that Tanner's reliance upon DeGraff Associated for three-sevenths of its business on the Grand Canyon tour, generating $120,000 a year in bookings confirmed in New York is sufficient contact with New York to satisfy the due process requirements of *International Shoe Co.* v. *State of Washington,* 326 U. S. 310 (1945), and establish a systematic course of doing business in New York by the Tanner corporations participating in operation of the Grand Canyon tour. As the New York court noted in *Frummer,* "We are not unmindful that litigation in a foreign jurisdiction is a burdensome inconvenience for any company. However, it is part of the price which may properly be demanded of those who extensively engage in

[interstate] trade. When their activities . . . through an agent, become as widespread and energetic as the activities in New York conducted by [defendant], they receive considerable benefits from such . . . .business and may not be heard to complain about the burdens." 281 N. Y. S. 2d at 45.

We are not called upon to consider the merits of the policy expressed by New York's test for *in personam* jurisdiction over foreign corporations which, being constitutionally permissible, is binding upon us. The question of whether or not the Eastern District of New York is an appropriate forum, as opposed to the question of whether or not it is a permissible forum, is not before us.[2]

The district court has *in personam* jurisdiction over the defendant corporation or corporations which operated the Grand Canyon tour under the name "Gray Lines of Las Vegas." As to those defendants who operated the Grand Canyon tour the judgment of the district court is reversed.

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2 Of course defendants are free to raise the question of the appropriateness of the forum by moving under 28 U. S. C. §1404(a) to transfer the action to a more convenient forum upon remand to the district court.

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 1112

TANNER MOTOR TOURS, LTD. (a California Corporation), TANNER MOTOR TOURS OF NEVADA, LTD. (a Nevada Corporation), TANNER MOTOR TOURS CORPORATION, LIMITED (a Nevada Corporation), TANNER MOTORS TOURS, LTD. (a Nevada Corporation), TANNER MOTOR TOURS LTD. OF CALIFORNIA (a California Corporation) and LUCKY CAB CO. (a Nevada Corporation),

Petitioners.

against

NETTIE GELFAND and PHILLIP GELFAND,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACOB D. FUCHSBERG,
250 Broadway,
New York, N. Y. 10007,
Counsel for Respondent.

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Questions Presented

Were appellants' activities within the State of New York sufficient to justify the imposition of the judicial jurisdiction in New York within the requirements of due process of law?

Is there presented by the petitioner a substantial constitutional question of such scope and importance that it should be reviewed by this Court?

Statement of the Case

This is an action for personal injuries arising out of an accident which occurred in Arizona in May, 1962. Plaintiffs were passengers on a "Gray Line" Scenic Motor Bus owned and operated by the defendants. The plaintiffs, husband and wife who were and are residents of the State of New York residing in Long Island, purchased tickets in New York for a Gray Line Scenic Motor Tour, as part of a planned vacation in the west. The Gray Line Tour began in Las Vagas, Nevada and was planned to encompass an overnight stay at the Grand Canyon in Arizona. While the bus was travelling in Arizona, the wheel of the bus broke off, causing an accident in which plaintiffs were injured, The complaint herein contains counts based both on negligence and upon a breach of contract of said carriage and for a safe vehicle.

Plaintiffs instituted the instant action against six named defendants. Three of the defendants, Tanner Motor Tours, Ltd. (a California Corporation), Tanner Motor Tours of Nevada, Ltd. (a Nevada Corporation), moved to dismiss the complaint for want of personal jurisdiction; the other three defendants made no appearance herein.

Six copies of the complaint were served on a Mr. Herbert DeGraff, the New York representative of the Gray Line Sight-Seeing Companies Associated, Inc. (hereinafter "Gray Line Association"). In addition, the Marshal's returns herein show that copies of the complaint were served upon the defendants in Los Angeles and Las Vegas.

Plaintiffs made arrangements through the Herren-Rogers Travel Service in Lynbrook, Long Island, for a vacation trip, the total cost of which was somewhat in excess of $1,000.

One part of plaintiffs' vacation trip was a Gray Line Scenic Motor Tour between Las Vegas, Nevada and the

Grand Canyon in Arizona scheduled for May 4, 1962. The cost of this Gray Line Tour was $80.

In early April, 1962, Mrs. Herren received confirmation for plaintiffs' trip from the hotels, bus lines and other facilities involved. Plaintiffs paid Mrs. Herren the balance of the cost of the trip and received two tickets and a confirmation of reservations for the Gray Line Tour. Mrs. Herren remitted the monies that she had received from plaintiffs to the various firms involved withholding her commissions.

Defendants operate a bus tour and motor livery service out of Las Vegas, Nevada and Los Angeles, California, under various trade names including Tanner Gray Line Mor Tours. The trade name "Gray Line" is used by defendant pursuant to a license from the Gray Line Association which is a non-profit membership corporation organized under the laws of Maryland. Gray Line Association is a trade association comprised of over ninety members engaged in the business of providing sightseeing and tour services throughout North America. The Association itself does not operate any tour services. Rather the Association licenses use of the Gray Line trademark and promotes the interest of its members. The defendants are members of the Gray Line Association. They pay dues and fees to the Association and receive in return, among other things, national advertising, public relations and other services.

Gray Line Association had a representative in New York, one Herbert J. DeGraff, who is listed in the Association Sightseeing Tariff as the Regional Vice-President of the Gray Line, in charge of sales for the Eastern Division with an office on Madison Avenue, in New York City. Mr. DeGraff, in addition to his services for the Gray Line represents other clients, including air lines and hotels. In this capacity, Mr. DeGraff's telephone number is listed in the Manhattan Telephone Directory under the name of Gray Line Association. The name of Gray Line Association

appears on the building directly for 501 Madison Avenue and upon the doors of Mr. DeGraff's office suite.

Among the services which Gray Line Association renders to its members is the publication of a Sight-Seeing Tariff containing descriptions of all the various tours offered by the member bus companies and the rates therefor. In this tariff there is contained a full-page picture of Mr. Herbert J. DeGraff who is referred to as "Regional Vice-President-Sales-Eastern Division" in an office at 501 Madison Avenue, New York, New York. Beneath the pictures of three Regional Vice Presidents in charge of Sales, including Mr. DeGraff, the following is stated:

> "GRAY LINE SALES OFFICERS AT YOUR SERVICE"
>
> "Gray Line Sales Offices have been established for your benefit and are equipped to assist you in processing of all Gray Line Services, rent-a-car, limousine, package tours, transfers, charter bus, boat sight-seeing trips, and special services for conventions and group travel. Gray Line Sales Offices are located in Chicago, New York, San Francisco and Los Angeles."

The inside of the back cover of the Tariff bears the following legend at the top:

> "Gray Line World's Largest Best Sight-Seeing Organization."

On the pages devoted to describing defendants' bus tours the defendant is referred to as Gray Line of Las Vegas. Gray Line of Las Vegas operates a sight-seeing, charter and transit bus service and rent-a-car in Clark County, Nevada, Boulder Dam and Grand Canyon, Arizona.

In the years 1960 to 1963, the gross revenues of this company were as follows:

1960	$320,995
1961	329,286
1962	344,250
1963	200,643

With its companion corporation, Tanner Motor Tours of Los Angeles, the Tanner Gray Line is the largest single operating company in the Gray Line organization, accounting for 14% to 15% total Gray Line sight-seeing business.

DeGraff Inc. had a contract with Gray Line under which it was retained for $23,500 a year, payable monthly in advance to perform the following duties on behalf of Gray Line Association:

> "A. To represent Gray Line as travel representative and agent in the Eastern portion of the United States as specified by Executive Committee directives.
>
> B. To familiarize itself fully with all services and facilities offered by Gray Line members.
>
> C. To contact and fraternize with travel forwarders situated in the Eastern portion of the United States.
>
> D. To take letters for folders and other printed material prepared for distribution by Gray Line and Gray Line members.
>
> E. To gather all available information on specialized group movements and forward such advice to interested Gray Line members.
>
> F. To compile data on all conventions which will occur in cities where there are interested Gray Line members and forward such reports to such members.
>
> G. To advise interested Gray Line members of all travel movements and to solicit such business for Gray Line members.
>
> H. To maintain an office in New York properly staffed to run the above services and assist in processing all Gray Line orders.
>
> I. To promote the overall welfare of Gray Line."

Carrying out his obligations under the contract, DeGraff performed among other things, the following services: He

employed a sales and reservation staff which would vary from a peak of about eighteen people in the peak period of the year to a minimum of around thirteen or fourteen (107). Of these, outside salesmen would number four or five to seven or eight (107). These outside salesmen would solicit business for Gray Line among others. They would call on travel agents, airlines, steamships, bus lines and determine if there were any people moving into areas where Gray Line renders service, and if they did, attempt to sell them on Gray Line service. They would see if the travel agents were working on any special group or special new programs and suggest Gray Line services as part of these programs (108). They would call on the tour departments of the airlines to see if the airline had any tours coming up. They would call on travel agents trying to call on each travel agent four times a year, with some of the big ones getting perhaps twenty-five calls a year (114).

DeGraff is not a travel agent. He deals with travel agents, and attempts to cultivate them in the interests of Gray Line, attending industry dinners and meetings and seeing the travel agents. As part of his work, he designs tours for the participation of travel agents. These tours would be designed so as to include elements of Gray Line services on the sight-seeing end so as to create business for the Gray Line bus companies. These would be in the nature of tie-in sales. The airlines would advertise something such as "Go to California for $350, including everything." The travel agents would participate by putting out brochures describing in specifics the details of the tour. The tour would of course when worked out by DeGraff, include Gray Line sightseeing.

DeGraff also, through his contacts, through his reading publications, through his attending trade meetings, attempted pursuant to his contract to keep up to date as to what kind of people were travelling to which areas and to

advise on these matters. It was in the nature of market research that he was doing.

DeGraff would also make sure that the various travel agents in the area were supplied with folders and brochures from the Gray Line. He would take such orders as the travel agents were out of them and forward them to Gray Line in Chicago to fill these orders out of their warehouse and distribute the folders and brochures to the travel agents as needed.

Also, from time to time, there would be complaints about the service that had been rendered from travel agents on behalf of their customers and these complaints would be forwarded to DeGraff who would ask for refunds or adjustments on the part of the people and/or their travel agents.

From time to time, also, travel agents would not pay a bill and DeGraff would get an inquiry from various Gray Line operators including the Las Vegas Gray Line and he would investigate to find out why a bill had not been paid.

In addition, the travel wholesalers, with whom DeGraff dealt, that is the travel agents who create tours that would be sold by other travel agents on a retail basis, were entitled for their work to an over-ride commission, depending upon the volume of their business and whether they met certain requirements with regard to the printing of Gray Line brochures and distributing of literature containing the name Gray Line. DeGraff would negotiate with these wholesalers the amount of their over-ride or the net price for the tour to the wholesaler which would enable them to mark up the tour and thus receive their payment.

DeGraff would also participate in the planning of tours. If there was a tour that was not selling, he would, from time to time communicate with the tour operator and advise him that the tour would have to be changed as to time and date or something else so that it could be sold. He would

participate in giving recommendations as to the planning of tours prior to the printing of Tariffs and schedules and if anything went wrong, whereby the tour was not selling, he would bring it to the attention of the tour operator after the Tariff came out. He would do that for Gray Line of Las Vegas.

On occasion, once a year usually, DeGraff would collect money from the various bus companies who were members of the Gray Line for the purchase of give-aways which he was using in promotions. In 1965, he purchased 5,000 cameras in New York for the purpose of promational give-aways and collected the money from the Gray Line members for this.

In addition to DeGraff's activities, relating to the solicitation, creation and facilitation of travel business through wholesalers, transportation companies and travel agents, DeGraff performs one further service for defendant, Tanner Motor Tours of Nevada Ltd. This service is not generally performed for the other Gray Line companies.

Most of Gray Line sight-seeing tours require no reservation. That is because they are short tours and Gray Line undertakes that anyone who shows up with a ticket will be provided with the service. However, Tanner Motor Tours of Nevada offers a tour of the Grand Canyon which requires hotel reservations at the Grand Canyon overnight. Because hotel rooms are required, reservations for this tour are required. Requests for reservations come in typically from travel agents. If there is space available the reservation is confirmed and notification is sent to Gray Line of Las Vegas, notifying them of the booking. In the years 1962, 1963, 1964 and 1965 the reservations booked by DeGraff in his New York office would amount to approximately 3,000 per year. The total hotel facilities at the Grand Canyon would amount to about 7,000 total passengers. So that of the total capacity of this tour, DeGraff's New York office books 3/7ths the total gross revenues from

the 3,000 reservations per year booked for Gray Line of Las Vegas would amount to $120,000 per year. This would be out of a total gross income of $200,000 to $300,000 per year. Merely for the reservations on the one Grand Canyon tour, which is only one of the tours which the defendant operates, this would amount to 60% of the defendant's gross business in some years (137). The service is crucial to the success of the tour and thus of the company. The reason it is necessary to have this central reservations service operated by DeGraff was explained by Mr. DeGraff. He said at the hearing below:

> "If I could bring this point out, there are about 5,000 travel agents in the United States. For the Grand Canyon to keep those 5,000 agents informed as to the availability of hotel rooms would not only be a big job but it would be economically disastrous for them to try and mail out or telephone 5,000 agents every day to keep them informed as to what the status is, and so rather than do that, we are kept informed and the agent calls us because there are only two ways you can get to the Grand Canyon up until this year; that was by Santa Fe Railroad or Gray Line."
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> • • •
>
> "It is an easier line of communication, it is better for the customer as well, because they can find out in a minute whether the customer can go or not rather than wait a week or ten days to get an answer back by mail."

This is because DeGraff is more current on Gray Line reservations than even the company itself, because his offices are all tied together by teletype and he is advised daily. Peculiarly this reservation work is not mentioned in DeGraff's contract with Gray Line. The service evolved as DeGraff put it, "By fifteen years of degeneration." The reason DeGraff inherited this obligation was,

"It added up that this was the only way you could merchandise that tour of the Grand Canyon and it just evolved over the years."

To run this reservation service, Mr. DeGraff had to hire a not insignificant staff. One reservation clerk can handle about 40 of those reservations a day. There are half a dozen clerks working on Grand Canyon reservations, though not exclusively. What they do is look up on the board where the hotel reservation schedule is kept and see whether the hotel is available. If it is they book the reservation. In return for these various services, the $23,000 paid by Gray Line to DeGraff amounts to 17% of the gross revenues of his office in New York (149).

The enumeration of DeGraff's services for Gray Line of Las Vegas, does not yet end. In addition to providing the central reservations service and all of the solicitation, packaging, market research and tour design services which has been above described, DeGraff actually sells tickets on the various Tanner Tours, collects the money and remits. These sales come about in two ways at least. In the first place, it someone were to call up DeGraff's office relying on his listing as Regional Sales Office for Gray Line and ask for a reservation, DeGraff's office after trying to encourage the person to see a travel agent would sell the ticket on the tour, collect the proceeds and remit to Tanner Motor Tours in Las Vegas (98-99). In addition, frequently, when selling a tour to an airline, the tour might include such things as car rental, limousine service from the airport and sight-seeing tours on the Tanner facilities. The airline would prepay these services by issuing an exchange order for whatever monies were required and DeGraff would remit to the company providing the service and collect the draft from his bank. This would happen in DeGraff's words "often".

The defendants' business in New York does not cease with DeGraff. In 1963, there were some 57 travel agents

who made sales on behalf of Tanner in New York. The travel agent issuing tickets in advance sometimes after confirming reservations with DeGraff and if it were for a tour that did not require reservation, merely issuing the ticket without consulting anyone. A duplicate of the ticket would be sent to Tanner as an advisory. This would presumably be accompanied by the remuneration, less commission, if the agent did not have credit arrangements and would be unaccompanied by remuneration if the agent did have credit arrangements. If the agent did have credit arrangements, the monies would be paid along with any other monies owing for any other tickets on ordinary commercial credit terms. The result is, of course, that not only does Tanner sell tickets in New York, with payment being made in New York, but maintains at any one time a rather large volume of accounts receivable owing to them by the various travel agents who have sold tickets on their behalf.

In addition the Gray Line Tariff, page 60, lists Tanner Motor Tours Ltd. as an Avis Rent-A-Car agency. Avis Rent-A-Car Inc. is a Delaware corporation with its principal place of business at Roosevelt Field, Garden City, New York. The Avis franchisee is Tanner Motor Livery Ltd., who is authorized to use the Avis name in the rent-a-car business in Southern California and Las Vegas, Nevada. In connection with operating this Avis Rent-A-Car franchise, Tanner is in the position that vehicles owned by it are transported all over the country and on various occasions have travelled from California and/or Nevada to New York and have been returned from New York to their point of origin. In addition, the Avis Rent-A-Car System, Inc., issues credit cards to the public which are used to rent cars at various stations. The central billing department, located in New York, collects the amount of these charges from the customer and remits to the licensee. During the six months prior to the hearing, Avis collected over $10,000 for rental of cars by Tanner through its cen-

tral billing procedure and remitted same to Tanner. This central billing procedure has existed between Avis Rent-A-Car System, Inc. and Tanner Motor Livery Ltd. since 1958.

Opinions Below

On petitioners' motion to dismiss the United States District Court for the Eastern District of New York dismissed the action for lack of personal jurisdiction over the defendants saying:

> "While defendants' affidavit are most unimpressive and are hardly very frank, and the existence of 'Gray Line Sightseeing Companies Associated' invites allusions to estoppels to deny; what finally emerges, is the bare, familiar picture of a carrier which performs all its carrier service far from New York and solicits business here through independent travel 'agents' or consolidated ticket 'agents'. The accident out of which the claims arise happened in Arizona."

The Court of Appeals for the Second Circuit reversed and remanded the matter for further proceedings (339 F. 2d 317) saying:

> "Hopefully the hearing will make clear the full scope and importance of DeGraff's activities on behalf of defendants and the closeness of the relationship between DeGraff and defendants through the Gray Line of which defendants are members."

After remand and following further hearings, Judge Dooling again dismissed the action. On appeal the Court of Appeals again reversed, saying:

> "In our view the decisive test is that upon which the court in Frummer relied 'the [reservation] service does all the business which [defendant corporation] could do were it here by its own officials' 281 N.Y.S.

2d at 44. In the context of the Frummer case, we take this to mean that a foreign corporation is doing business in New York 'in the traditional sense' when its New York representative provides services beyond 'mere solicitation' and these services are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporations own officials would undertake to perform similar services.

Mr. DeGraff testified that the reason his office booked reservations for Tanners Grand Canyon Tours was that 'this was the only way that you could *merchandise* that tour of the Grand Canyon' . . .

We conclude that Tanner's reliance upon DeGraff Associates for three-sevenths of its business on the Grand Canyon Tour, generating $120,000 a year in bookings confirmed in New York is sufficient contact with New York to satisfy the due process requirements of *International Shoe Corp.* v. *State of Washington,* 326 U. S. 310 (1945) and establish a systematic course of doing business in New York . . ."

Summary of Argument

1. The Court of Appeals was clearly correct in upholding jurisdiction. The scope, breadth and importance of DeGraff's activities, in New York on behalf of petitioner performed on a systematic basis more than met the "minimal contacts" requirements of *International Shoe Corp.* v. *State of Washington,* 326 U. S. 310 (1945).

It is not determinative that DeGraff was not a salaried employee of petitioners. If they had not made the arrangement they did with DeGraff they would have had to maintain salaried officers in New York to perform DeGraff's work.

Since they derived three-sevenths of their bookings on the Grand Canyon Tour from DeGraff's office in New York

amounting to $120,000 per year it is not unfair or unreasonable to require petitioners to defend in New York a suit by New York residents injured on that tour.

2. This case presents no constitutional question of general interest or application. Presented is merely one more in an almost limitless number of varying factual situations which must be weighed utilizing principles laid down in *International Shoe Corp.* v. *State of Washington,* 326 U. S. 310 (1945), in order to determine whether there is sufficient contact with the forum to make it fair to require an out of state corporation to defend a suit in that jurisdiction. For this reason there is no conflict between the decision of the Court of Appeals for the Second Circuit herein and the decision in the Fifth Circuit, in *Turner* v. *Jack Tar Grand Bahama, Ltd.,* 353 F. 2d 954. In that case, the facts were different. There was far less contact with the forum state than is the fact in the case at bar.

POINT I

It is not violative of due process of law to require the petitioners to defend this action in New York.

We regard it as clear, as the Court of Appeals held, that petitioners' activities in New York were sufficient to meet traditional "presence" requirements.

A discussion of whether or not a foreign transportation company is doing business within the State must of necessity begin with *Green* v. *Chicago Burlington and Quincy Railway Co.,* 205 U. S. 530. There an out-of-state railroad company maintaining no tracks within the State of Pennsylvania did maintain an office manned by several clerks and soliciting agents for the solicitation of freight and passenger traffic. This Court held that the defendant rail-

road was not subject to jurisdiction in Pennsylvania and announced as its rationale the now famous "mere solicitation" rule.

In *International Harvester* v. *Kentucky,* 234 U. S. 579, however, this Court made clear that this "mere solicitation" rule was unique to out-of-state transportation or hotel companies, since it said, with regard to an out-of-state manufacturer whose agents maintained no permanent office within the State of Kentucky and whose sole function as travelling salesmen was to solicit the sale of merchandise which would be subject to the approval of the general agent outside the state and which after approval would result in shipments F.O.B. some point outside of the state of goods to within the state, that the company was doing business within the State of Kentucky. This court said:

> "Here was a continuous course of business in the solicitation of orders which were sent to another state and in response to which the machines of Harvester Company were delivered within the State of Kentucky. This was a course of business not a single transaction. The agents not only solicited such orders in Kentucky, but might there receive payment in money, checks or drafts."

It was therefore clear under the rule announced in *International Harvester* v. *Kentucky, supra,* that any continuous course of solicitation which results in shipments of goods into a state constitutes doing business. This rule was adopted in New York in the case of *Tauza* v. *Susquehanna Coal Co.,* 220 N. Y. 259. In the *Tauza* case, *supra,* Judge Cardozo, emphasizing the fact that the order received resulted in the shipment of goods into the state held the defendant to be doing business within New York. The Court said:

> "That there is no precise test of the nature or extent of the business that must be done. All that is requi-

site is that enough be done to enable us to say that the corporation is here."

In the language of Judge Learned Hand in *French* v. *Gibbs Corp.*, 189 F. 2d 787, 790 (2nd Cir. 1931):

> "Any continued local activities meets the strict presence requirements; the rest is merely a matter of more or less."

And in *Barnett* v. *Texas and Pac. Ry. Co.*, 145 F. 2d 800, the Second Circuit Court of Appeals held that an out-of-state railway was doing business in New York where the volume of freight and passenger business initiated in New York was slight when the defendant's New York office actually sold tickets for transportation on defendant's line and issued bills of lading in New York on irregular basis, this Court said:

> "Defendant contends that the District Court correctly held that its decision was compelled by the 'solicitation' doctrine of Green v. Chicago B. & Q. R. Co., 205 U. S. 530, 27 S. Ct. 595, 51 L. Ed. 916, that in International Harvester v. Kentucky, 234 U. S. 579, 586, 34 S. Ct. 1944, 58 L. Ed. 1479, the Court referred to the Green case as 'extreme'. In Hutchinson v. Chase and Gilbert, 2 Cir., 45 F. 2d 139, 141, this Court per Judge L. Hand, said 'Possibly the maintenance of a regular agency for the solicitation of business will serve without more.' The answer made in Green v. C. B. & Q. R. Co., 205 U. S. . . . perhaps becomes somewhat doubtful in light of International Harvester Co. v. Kentucky. . . and if it still remains true it readily yields to slight addition. See also Jacobowitz v. Thomson, 141 F. 2d 72. Here there were more than 'slight additions' i.e. the actual selling of tickets for transportation on defendants' line and the issuance of bills of lading in New York to say nothing of the handling of complaints. It is urged that not many of these acts occurred each

year. That those acts were authorized by defendant which put no limit on the number of such acts that its employees may perform. We think that the authorized performance of such acts constitutes doing business in New York, even if the volume of freight and passenger business initiated in New York is not as great as we may surmise defendant would like it to be."

This Court's landmark decision in *International Shoe Corp.* v. *State of Washington,* 326 U. S. 310, formulated the presence requirements as follows at page 316:

". . . due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"

"Minimum contacts" were said by this Court to constitute:

". . . such contacts of the corporation with the State of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection:" *International Shoe Co.* v. *State of Washington, supra,* at page 317.

As this Court also said in *International Shoe Corp.* v. *State of Washington,* at page 317:

" 'Presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no con-

sent to be sued or authorization to an agent to accept service of process has been given."

Here we have no "casual presence of a corporate agent" or "his conduct of single isolated items of activity in the State" but a continuous and systematic carrying out of business in New York. In *Bryant* v. *Finnish National Airlines,* 15 N. Y. 2d 428, the New York Court of Appeals held that the defendant was doing business in New York. It made clear that the mere fact that the defendant did not operate its airlines within New York State, was not determinative. The Court stated that the test for doing business "is and should be a simple pragmatic one". The fact that the defendant maintained an office in New York, staffed by several employees and had a bank account in New York and "does public relations and publicity work for the defendant here including maintaining contacts with other airlines and travel agencies and while it does not make reservations or sell tickets, it transmits requests for space to defendant in New York, and helps to generate business. These things should be enough". The Court said.

It does not seem to us significant that instead of DeGraff receiving a check directly from the petitioners, he is paid by an association to which petitioners belong, and to which petitioners contribute dues for the express purpose among others of securing the services of DeGraff or somebody like him to be shared among the members. See Judge Learned Hand in *Bromze* v. *Nardis Sportswear,* 165 F. 2d 33. What is important is the scope and continuity of the activities here in New York whether performed by a salaried employee or by some other breed of agent.

What is important is that petitioners maintained in New York a continuity of the activities from a permanent locale. As the Court said in *Blount* v. *Peerless Chemical (P. R.) Inc.,* 316 F. 2d 695, quoting with approval from Note 104 of Pa. Law Rev. 381, 402, DeGraff performs for the defendant "such an overwhelming portion of its busi-

ness that the latter has achieved most of the advantages which would accrue if the corporation performed the activity itself". It is distinctly unpragmatic to say that the defendant does not do business here in New York, because DeGraff's salary is not paid directly by it but is paid rather through an intermediary formed for just this purpose.

And DeGraff in our view does just this; performs an overwhelming portion of the defendant's business and performs it in New York.

Most of defendant's sales effort takes place in New York and is performed by DeGraff. By selling, we do not mean "mere solicitation". In selling anything, one must first determine the market for that which one sells. It is necessary to search out the sources of business. In current parlance, this is known as market research, and in places and at times market research has become quite "scientific". Whether performed scientifically or not, it is an important management function. DeGraff's contract required him:

> "to gather all available information on specialized group movements and forward such advice to interested Gray Line members; to compile data on all conventions which will occur in cities where there are interested Gray Line members, and forward such reports to such members; to advise interested Gray Line members of all travel movements and to solicit such business for Gray Line members."

This is market research and DeGraff so called it. So far as appears from the record, DeGraff is the only source of this kind of market research for the defendants so that instead of having a Vice-President for market research, defendants have DeGraff, and DeGraff is in New York.

Perhaps the next step in selling any product or service is to package it attractively, so that it will be appealing to the prospective customer. The sole source of business

for a sight-seeing bus company is the tourist. Today, much of the tourist business is derived from groups who take off on a pre-packaged pre-arranged tour including all elements of such a tour, transportation, lodging, etc. For defendants, it is DeGraff who arranges tours. After consultation with large travel agents who he calls wholesalers and other carriers such as airlines, DeGraff will plan and arrange pre-packaged group tours which will include sight-seeing trips on the petitioners' buses, so as to promote business for them.

Here again, the work of packaging these tours is essential to the prosperity of the defendants' sight-seeing business. It could of course be done by an employee, but that employee if he did not work out of a New York office would have to be in New York with great frequency for here is where all the airlines are and here is where most of the large travel agents are. The defendant could do this work by an officer in charge of tour-planning and promotion. But instead DeGraff does it, and DeGraff is in New York.

After performing the market research, packaging and promoting the service, the next sales function would be solicitation, and here DeGraff also performs an important service. He maintains 8 to 11 salesmen who call on the trade. He tries to call on a travel agent four times a year. Some of the big ones would be called 25 times a year. It is true, of course, that solicitation by and of itself has repeatedly been held not to constitute doing business. However, in all of these cases, the salesman was no more than a mere order taker. Orders were required to be transmitted to the home office for acceptance. DeGraff's authority is much broader. Since for the most part he is dealing with the large travel agents, what he calls "wholesalers", these wholesalers are entitled to override commissions on the business they write. Part of DeGraff's function was to negotiate the override commission and thus the net price to the customer.

The last major service performed by DeGraff for defendants is the reservation service. Sixty percent of the gross business of the defendant, Tanner Motor Tours of Las Vegas, is booked out of DeGraff's office.

Three-sevenths of the booking of petitioners' Grand Canyon Tour on which respondents were injured were booked out of DeGraff's office in New York. DeGraff's reservation was, as DeGraff himself said, essential to effective merchandising of the tour and resulted in approximately $120,000 a year in bookings to petitioners.

Six of DeGraff's clerks spent part of their time working on the Grand Canyon reservations.

We would submit that petitioners had immersed themselves deeply in New York on a systematic regular basis. DeGraff's activities on behalf of petitioners are so widespread and so important to the proper conduct of their business that if they had not made the arrangements that they did with DeGraff through the Gray Line, they would have had to open an office manned by their own officials in New York to undertake substantial similar services.

The systematic conduct of these widespread and crucial activities in the New York market by petitioners securing for petitioners, as they do, all of the benefits afforded by such activities including the right to resort to the New York Courts for protection of their rights, warrants the imposition of jurisdiction upon them and justifies any inconvenience that might be imposed upon them by requiring them to defend in New York, this lawsuit, arising, as it does out of the very activities performed by petitioners in New York.

Having entered into the New York market on the systematic continuous basis from a permanent locale for the purpose of seeking out business from travel agencies, other transportation companies and individuals, and actually maintaining in New York an office through which

arrangements for this travel business could be finalized which generated three-sevenths of their business amounting to $120,000 a year, we submit that petitioners cannot be heard to complain that it would be unfair to require them to defend this lawsuit in New York.

This is not a case where the defendant had no contact with the forum state or conducted merely casual or isolated activities therein.

POINT II

There is presented for review no constitutional issue of widespread or general application.

As this Court said in *International Shoe Corp.* v. *State of Washington*, 326 U. S. 310, 319, 320, there is no mechanical or quantitive test to mark the boundary line between those activities which justify the subjection of the corporation to sue and those who do not. "Whether due process is satisfied must depend upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."

What is required is a weighing of "such activities of the corporation with the state of the forum as make it reasonable . . . to require the corporation to defend . . .", *International Shoe Corp.* v. *State of Washington*, 326 U. S. 310, 317. Under such circumstances each case must pretty much be decided on its own peculiar facts bearing in mind the principles enunciated by this Court in *International Shoe*. Having laid down the principles involved, it would serve no useful purpose for this Court to involve itself in the thicket of the many varying factual situations which are presented by the literally thousands of cases decided or to be decided under these principles.

Some of the factors which have been considered in the past, in deciding whether or not jurisdiction would apply, have been where title to goods shipped into the forum state passed and whether or not payment could be accepted in the forum state, *International Harvester* v. *Kentucky*, 234 U. S. 579, whether or not defendant was represented in the State by a local branch or by separate local branch corporation, *Sterling Novelty Corp.* v. *Frank & Hirsch Distributing Co.*, 299 N. Y. 208, and whether or not the local agent could bind the out-of-state principal, *Miller* v. *Surf Properties*, 4 N. Y. 2d 475.

There are many other factors that have been considered in the past by the Courts. These factors recur variably from case to case, but no one factual situation is exactly like another. A decision by this Court in this case could decide only this case and no other case because of the variable nature of the factual situations presented and the necessity in each case to weigh the quality of the contacts with the forum state against the inconvenience to the defendant of requiring it to defend there.

Because there are so many variables in the factual situations presented, there is no conflict between the decision of the Court of Appeals in the Second Circuit in the case at bar and the decision in the Fifth Circuit in *Turner* v. *Jack Tar Grand Bahama, Ltd.*, 353 F. 2d 954.

The contacts of the defendant's hotel with the State of Texas in the *Turner* case, *supra*, were far less than the contacts of petitioners in the State of New York in this case. There was only isolated irregular activity consisting of the occasional forwarding of reservations from affiliated hotels and the occasional holding of meetings by the principals of the defendant corporation in Texas.

No such circumstances as existed in the case at bar, existed in the *Turner* case, *supra*. There was in *Turner* no energetic and widespread marketing activities resulting in

such a substantial percentage of the defendant's total business being generated in the forum as it is in the case at bar. Nor were the activities in the forum state so crucial to the proper conduct of the business as they are in the case at bar.

CONCLUSION

Petition for a writ of certiorari should be denied.

Respectfully submitted,

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